122-501

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~617~~. 568 288

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THE MUSKEGON NATIONAL BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 8, 1884.

SUPREME COURT OF THE UNITED STATES.

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No. 917.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The Muskegon National Bank, plaintiff, and The Northwestern Mutual Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said defendant as is said, and as appears by its complaint, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 21st day of March, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eighth.

[SEAL.] TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

Allowed.
W. J. WALLACE.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to one hundred and fifty, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of The Northwestern Mutual Life Insurance Company, plaintiff in error, against The Muskegon National Bank, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twelfth day of July, in the year of our Lord one thousand eight hundred and eighty-four, and

of the Independence of the United States the one hundred and ninth.

[SEAL.] TIMOTHY GRIFFITH, *Clerk.*

[Endorsed:] U. S. Supreme Court. The Northwestern Mutual Life Insurance Company, plaintiff in error, against The Muskegon National Bank, defendant in error. Writ of error. Edward Salomon, attorney for the plaintiff in error, 115 Broadway, N. Y. I admit due service of the within writ of error. Dated N. Y., March 21, 1884. John P. Adams, att'y for def't in error. U. S. circuit court. Filed Mar. 21, 1884. Timothy Griffith, clerk.

3 United States Circuit Court for the Southern District of N. Y.

THE MUSKEGON NATIONAL BANK

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

The clerk of the circuit court of the U. S. for the southern district of N. Y. will please issue a summons in the above-entitled action.

Yours, &c., JOHN P. ADAMS,
Pl'ff's Att'y, 194 Broadway, N. Y.

N. Y., April 3, '82.

4 [Endorsed:] U. S. circuit court. Muskegan National Bank *vs.* Northwestern Life Ins. Co. Precipe. John P. Adams, pl'ff's att'y. U. S. circuit court. Filed Apr. 3, 1882. Joseph M. Deuel, clerk.

5 United States Circuit Court for the Southern Distrit of New York.

THE MUSKEGAN NATIONAL BANK

against

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, this third day of April, in the year one thousand eight hundred and eighty-two.

6 [L. S.] JOSEPH M. DEUEL, *Clerk.*

JOHN P. ADAMS, *Plaintiff's Att'y.*

Office and post office address, 194 Broadway, New York.

Due and legal service of the within summons hereby admitted this 14th day of April, 1882.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
By H. L. PALMER, *Pres't.*

[Endorsed:] The United States circuit court, southern district of New York. The Muskegan National Bank *vs.* Northwestern Mutual Life Insurance Co. Summons. John P. Adams, plaintiff's attorney. To the defendant within named: Take notice, That upon default judgment will be taken for the sum of $20,000 in money, with interest from the 24th day of September, 1881, besides costs. John P. Adams, pl'ff's att'y, 194 Broadway, N. Y. city. Circuit court. Filed Apr. 27, 1883. Joseph M. Deuel, clerk.

7 The United States Circuit Court, Southern District of New York.

THE MUSKEGAN NATIONAL BANK, Plaintiff,
against
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant

The plaintiff, by John P. Adams, its attorney, complaining of the defendant, respectfully shows to this honorable court, and alleges on information and belief:

I. That plaintiff is a corporation duly organized under and by virtue of the laws of the United States relating to national banks, located and doing business in the city of Muskegan, in the State of Michigan.

II. That defendant is a corporation duly organized under and by virtue of the laws of the State of Wisconsin for the purpose
8 of carrying on the business of life insurance, and having its principal place of business in the city of Milwaukee, in said State of Wisconsin.

III. That on and before the 17th day of April, 1879, one Erwin G. Comstock had become and continued to be, and then was, justly indebted to the plaintiff in the sum of more than twenty thousand dollars; that defendant, on the said 17th day of April, 1879, issued and delivered to plaintiff its policy of assurance in writing, numbered 99256, by which it undertook, contracted, and agreed, in consideration of the representations made in the application for said policy, and of the premium, in advance, consisting of the annual cash premium of sixty-seven dollars, to be paid at, or before noon, on or before the 17th day of April, in every year during the continuance of said policy, to assure the life of the said Erwin G. Comstock for the benefit of the plaintiff, creditor, in the amount of twenty thousand dollars, for the term of the natural life of the said Comstock,
9 and further undertook, promised, and agreed to pay the said sum to the plaintiff, its successors or assigns, in sixty days after due notice and proof of death of the said Comstock.

IV. That plaintiff duly performed all the conditions of the said contract of assurance on its part.

V. That on the 29th day of June, 1881, the said Erwin G. Comstock died in the city of New York. That at and before the time of his death no part of the aforesaid indebtedness had been paid to plaintiff, but still continued and amounted to more than the sum of twenty thousand dollars, and that due notice and proof of death of the said Comstock were given and presented by plaintiff to the defendant at its office, in the said city of Milwaukee, on or about the 25th day of July, 1881.

VI. That on and after the lapse of sixty days from the time the said notice and proof were given and presented, the plaintiff duly demanded from defendant the payment of the said sum of
10 twenty thousand dollars, but defendant has neglected and refused to pay the same, and no part thereof has been paid.

Wherefore plaintiff demands judgment against the defendant for the sum of twenty thousand dollars, with interest from the 24th day of September, 1881, together with the costs of this action.

JOHN P. ADAMS,
Plaintiff's Attorney.

11 STATE OF NEW YORK, }
City and County of New York, } *ss:*

John P. Adams, being duly sworn, says: That he resides in the county of Kings, in said State; that he is attorney for the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof, and that he believes the same to be true; deponent further says that the reason this verification is not made by an officer of the plaintiff is because plaintiff is a foreign corporation, and is not within the county of Kings or State of New York, and has no officer within said county or State, and that the grounds of his belief are:

First. The terms of the said contract of assurance, a copy of which is in deponent's possession.

Second. Statements contained in written communications between defendant and plaintiff, copies of which are in deponent's possession.

Third. Statements made to deponent in letters from plain-
12 tiff, and orally by a director and agent of plaintiff.

JOHN P. ADAMS.

Sworn to before me this 16th day of May, 1882.

JACOB SHRADY,
Notary Public, Kings Co.

Certif. filed in N. Y. Co.

13 [Endorsed:] U. S. circuit court. The Muskegan National Bank, plaintiff, against the Northwestern Mutual Life Ins. Co., defendant. Complaint. John P. Adams, attorney for plaintiff, 194 Broadway, New York city. Due and timely service of the within or a copy thereof is hereby admitted. Dated New York, May 19, 1882. Salomon & Dulon, attorneys for def't.

14 United States Circuit Court for the Southern District of New York.

THE MUSKEGON NATIONAL BANK, Plaintiff,
against
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant.

First Defence.

The above-named defendant, answering the complaint in this action, for a first defence therein, alleges and says on information and belief that the said plaintiff and Erwin G. Comstock, in the complaint mentioned, on or about the 7th day of May, A. D. 1879, made and presented to said defendant a joint application in writing for the policy of insurance in the complaint mentioned, which application is dated the seventeenth day of April 1879, wherein and whereby they, amongst other things, stated and declared that the said Erwin G. Comstock was not then and would not become habitually intemperate; that the statements contained in said ap-
15 plication should form the basis of said policy of insurance which was to be issued thereon, and that any untrue or fraudulent answers, any suppression of facts in regard to the said Erwin G. Comstock's health, habits, or circumstances, material to the risk, should vitiate said policy and forfeit all payments made thereon; that said policy of insurance was issued by this defendant and accepted by said plaintiff upon the express condition, amongst others, contained therein, that, if any of the statements or declarations in said application for said policy, and upon the faith of which it was issued, should be found in any material respect untrue, then said policy should be null and void; that, in fact, as this defendant is informed and believes, at the time of making and presenting said application as aforesaid and of the issuing of said policy, the said Erwin G. Comstock was and prior thereto had been habitually intemperate, and that the said statement in said application contained that said Erwin G. Comstock was not then habitually in-
16 temperate, was untrue and fraudulently made, and a suppression of facts material to the risk assumed by said policy of insurance.

Second Defence.

And this defendant, further answering, for a second and separate defence, alleges and says, on information and belief, that the said plaintiff, in and by the said application and policy of insurance, covenanted, agreed, and warranted that the said Erwin G. Comstock would not become habitually intemperate, and that said policy was issued by this defendant and accepted by said plaintiff upon the express condition, amongst others contained therein, that if said Erwin G. Comstock should become either habitually intemperate or so far intemperate as to impair health or induce *delirium tremens*, the said policy should be null and void; that in fact, as this defendant is informed and believes, the said Erwin G. Comstock did,

after the issuing of said policy, become habitually intem-
17 perate, and so far intemperate as to impair his health and induce *delirium tremens*, and that thereby the said policy became and is null and void.

Third Defence.

And this defendant, further answering, for a third and separate defence, alleges and says, on information and belief, that said policy of insurance was issued by this defendant and accepted by the said plaintiff, on the express condition, amongst others contained therein, that if the said Erwin G. Comstock should die by his own hand or act, the said policy should be null and void; but that if it should so become null and void, this defendant should return the premiums received, less dividends paid on said policy; that, as this defendant is informed and believes, the said Erwin G. Comseock did die by his own act, whereby the said policy has become and is void; that this defendant has, before the commencement of this action, offered to return the premiums which it has received on said policy to said plaintiff, but said plaintiff has refused to ac-
18 accept the same, and that this defendant is still ready and willing and offers to return said premiums.

Fourth Defence.

And this defendant, further answering for a fourth and separate defence, alleges and says, on *on* information and belief, that the said plaintiff and the said Erwin G. Comstock, on or about the 7th day of May, 1879, made and presented to said defendant a joint application in writing for the policy of insurance in the complaint mentioned, which application is dated the 17th day of April, 1879, wherein and whereby, amongst other things, it was stated that the relationship of the said plaintiff to the said Erwin G. Comstock was that of a creditor; that they required a policy to be issued to the amount of $20,000, and that said plaintiff had an interest in the life of said Erwin G. Comstock to the full extent of the said sum of $20,000; that said application and the statements and declarations therein contained formed the basis of the said policy
19 of insurance, and upon the faith of which it was issued, and that it was expressly provided in said policy of insurance that if any of the statements or declarations in said application should be found in any material respect untrue, then and in every such case said policy should be null and void; and that the said declaration that the said plaintiff had an interest in the life of said Comstock as a creditor to the full extent of the amount of $20,000 was untrue in fact, but the indebtedness of said Comstock to said plaintiff amounted to several thousand dollars less than said sum of $20,000 at the time of said application and the issuing of said policy.

SALOMON & DULON,
Defendant's Attorneys, 115 *Broadway, New York City.*

20 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Edward Salomon, being duly sworn, says that he is one of the attorneys for the defendant in the above-entitled action; that the foregoing amended answer is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by the defendant is that it is a foreign corporation, none of whose officers are within this State, or within the city and county of New York, where deponent resides, and that deponent's information and the grounds of his belief as to the matters above stated on information and belief are the original pleadings in said suit and letters and documents received from the said defendant and its president and counsel relating to said action.

EDWARD SALOMON.

Sworn to before me, this 10th day of April, 1883.

M. S. ISAACS,
Notary Public, N. Y.

21 [Endorsed:] U. S. circuit court, southern district of N. Y. The Muskegan National Bank *vs.* The Northwestern Mutual Life Insurance Company. Copy. Amended answer. Salomon & Dulon, defendant's att'ys, 115 Broadway, New York city. To John P. Adams, Esq., pl'ff's attorney.

22 *Notice of Trial.*

U. S. Circuit Court for the Southern District of New York.

THE MUSKEGAN NATIONAL BANK
against
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Please to take notice that the issue of fact in this action will be brought to trial, and an inquest taken at a trial term appointed to be held in and for the southern district of New York at the post-office building, in the city of New York on the 3d Monday of October, 1882, at 10.30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated the 21st day of September, 1882.

Yours, &c. JOHN P. ADAMS,
Attorney for Pl'ff, 194 *Broadway, N. Y. C.*

To SALOMON & DULON,
Attorneys for Def't, 115 *B'way.*

23 [Endorsed:] U. S. circuit court, southern dist. of New York. The Muskegan National Bank *ag'st* The Northwestern Mutual Life Insurance Company. Notice of appeal. John P. Adams, attorney for pl'ff. Due and timely service of a notice, of

which the within is a copy, is hereby admitted this 21st day of September, 1882. Salomon & Dulon, attorneys for def't, 115 B'way.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Monday, the 15th day of October, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Nathaniel Shipman, judge.

THE MUSKEGAN NATIONAL BANK
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Now comes the plaintiff and by John E. Parsons and John P. Adams, his attorneys, moves the trial of this cause. Likewise comes the defendant, by Edward Salomon, its attorney.

Thereupon a jury is impanelled, and the cause proceeds to trial.

25 After hearing the evidence of the parties, the argument of counsel, and the instructions of the court on Monday, October 22, 1883, the jury retire, and on their return render a verdict, whereby they find for the plaintiff in the sum of twenty-two thousand nine hundred and five dollars.

On motion of counsel for defendant, the court orders that the defendant have a stay of proceedings on said verdict for thirty days from Oct. 22, 1883.

A copy. TIMOTHY GRIFFITH, *Clerk.*

26 Circuit Court of the United States for the Southern District of New York.

THE MUSKEGAN NATIONAL BANK, Plaintiff,
against
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant.

The issues in this action having been brought on for trial before Hon. Nathaniel Shipman, judge, and a jury at a stated term of this court, held at the court-house thereof, in the city of New York, on the third Monday of October, 1883, and the fourth defense having been withdrawn on motion in open court, and the issues having been tried, and a verdict for the plaintiff having been duly rendered on the twenty-second day of October, 1883, and the plaintiff's costs having been adjusted at two hundred eighty-one and $\frac{57}{100}$ dollars, now, on motion of John P. Adams, attorney for said

27 plaintiff, it is adjudged that the said plaintiff recover of said defendant twenty-two thousand nine hundred and five dollars found by the jury, with two hundred and eighty-one $\frac{57}{100}$ dollars costs and five hundred thirty and $\frac{47}{100}$ dollars interest on the amount awarded by said verdict, making together twenty-three thousand seven hundred seventeen and $\frac{04}{100}$ dollars.

Judgment signed this 11th day of March, 1884.

JOHN A. SHIELDS,
Deputy Clerk.

28 [Endorsed:] Circuit court of the United States for the southern district of New York. The Muskegan National Bank, plaintiff, against The Northwestern Mutual Life Insurance Company, defendant. Judgment roll. John P. Adams, attorney for plaintiff, 194 Broadway, New York city. U. S. circuit court. Filed March 11, 1884. Timothy Griffith, clerk.

29 United States Circuit Court, Southern District of New York.

THE MUSKEGON NATIONAL BANK, Plaintiff,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant.

Case and Bill of Exceptions.

Salomon & Dulon, defendant's attorneys, 115 Broadway, N. Y. city.

U. S. circuit court. Filed Dec. 11th, 1883. Timothy Griffith, clerk.

30 Circuit Court of the United States, for the Southern District of New York.

THE MUSKEGON NATIONAL BANK, Plaintiff,
against
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant.

The above entitled action came on to be tried at a term of said court begun and held in the city of New York on the third Monday of October, 1883, before Hon. Nathaniel Shipman, judge, and a jury, Mr. John P. Adams and Mr. John E. Parsons appearing as counsel for the plaintiff, and Mr. Edward Salomon as counsel for the defendant. The jury having been duly empanelled and sworn, the following proceedings were had in said action.

The defendant's counsel having claimed the right to open and close the case upon the pleadings therein, to which the plaintiff's counsel objected on account of the allegations of the fourth defense in the defendant's amended answer pleaded, and the court having thereupon sustained the plaintiff's objection, the defendant's counsel asked leave to withdraw said fourth defense, and leave having been granted by the court, said fourth defense was accordingly withdrawn, and the defendant's counsel thereupon opened the case to the jury.

31 Thereupon the defendant's counsel offered and read in evidence the original policy of insurance in the complaint mentioned and produced by the plaintiff's counsel, a copy of which is hereto annexed, marked Defendant's Exhibit No. 1.

Thereupon the defendant's counsel further offered and read in evidence the original application for said policy signed by Erwin G. Comstock and the Muskegon National Bank, by William B. McLaughlin, cashier, excluding that portion which is headed "Agent's Statement," a copy of which is hereto annexed, marked Defendant's Exhibit No. 2.

Thereupon the defendant's counsel read in evidence the deposition of William B. McLaughlin, taken at Muskegon, Michigan, on behalf of the defendant, in the month of February, 1883, when said witness, after having been duly sworn, and being examined by defendant's counsel, testified as follows, to wit:

My age is thirty years; my residence Muskegon, Michigan; my occupation at present the settlement of the estate of W. S. Gerrish, deceased. I was in the employ of the Muskegon National Bank from the time of its organization until March, 1881, all the way up from collection clerk to cashier. I was collection clerk from November, 1870, for about two years; then teller for a short time, a few months; then book-keeper for about three months; then again teller, in which capacity I continued until August or September, 1876, when I was appointed acting cashier, and I think held that title until January, 1878, and was then appointed cashier, which position I held from that time until March, 1881. I knew Erwin G. Comstock from 1870 until the time of his death; while I knew him he was one of the firm of A. Gustin & Co., and cashier of the Muskegon National Bank, and subsequently a broker in New York, after he left Muskegon. I know something about his habits during the period of my acquaintance with him, with relation to the use of intoxicating liquors as a beverage; my knowledge
32 of it covers the time he resided in Muskegon; I know that he used to be under the influence of intoxicating liquors at times. I couldn't just say how many times during his residence here, but frequently. I can say that he was absent from business a good many times; my recollection is that he generally stayed away from business when he was in that condition. He would frequently go away from town without leaving any word at the office where he was going or that he was going at all, and be gone perhaps a week or ten days. He would sometimes make checks on the bank while he was away, and I could see from the signature or penmanship that he was not right, that he was on a spree. When he was in town he stayed away from business most of the time when he was in that condition; he would come into the office and sign drafts or something of that sort, but wouldn't do much of anything else. I have destroyed a number of drafts signed by him while in that condition, because I thought the signature was not fit to go out. These sprees, while he was in town, would generally continue from three to six days; at these times he looked as if he was drunk; his eyes would be red, blood-shot, he would be black around the eyes; he would be very nervous, and I think would have a sick spell after it, perhaps be confined to his bed for a day or two. He naturally wrote a very square, clean hand, and when under the influence of liquor it was a good deal of a scrawl, very irregular; when he signed drafts in such times he didn't inquire into the circumstances connected with their issue or the business with which they were related; on such occasions at times I thought he would make an effort to be a little more pleasant than usual, and at other times he would be just the other way, more quiet and sullen, it would be hard to

get an answer out of him. He left the employment of the bank about the middle of July, 1875. I know what the directors
33 said about the reason of his leaving. It was on account of irregularities in his management, his salary was to be reduced, and it was understood from that he would resign. The irregularities were a fictitious entry of $5,000 made by him in the books in the New York account.

The plaintiff's counsel thereupon read in evidence the cross-examination of said witness in said deposition contained as having been had by plaintiff's counsel, as follows, to wit: Besides the settlement of the estate of W. S. Gerrish, I hold an agency from the Northwestern Mutual Life Insurance Company. I make their collections here, but in speaking of my business I have never looked upon that in that light. I will add that to my answer to the question as to what is my business. My agency is not limited to the making of collections. I am at liberty to solicit all the insurance I can get. I think I have written one application for $1,000 this year, and I have talked with one or two others about insurance. I think I have been agent for this insurance company since 1878. When I ceased to be cashier of the bank I stopped depositing my renewal receipts in it for collection. I made the collections at my office in person for some months, and as my business took me out of the city a great part of the time, I deposited a part of the renewal receipts in the Lumberman's Bank for collection. I decline to answer the question at present what commission I receive for making these collections, not because it is anything that I care anything about, but because I think it isn't anybody's business what commission I get. I also decline to state what my average gross receipts are annually for compensation from this company. The following are the names and residences of all persons employed in the bank while Comstock was there: Thomas Burry, whose residence I don't know; Charles Lansiff, now deceased; William S. Wood, residence Muskegon; Horace Gates, present residence unknown to me; F. H. Holbrook, residence Muskegon; Frank Field, present residence unknown to me; Frank Wood, residence Mus-
34 kegon; S. P. Hovey, residence Ionia, I think; Stephen Ryan, present residence unknown to me. The janitors were Herman Benenga, residence Muskegon; Cornelius Benenga, son of the latter, residence, Muskegon; Mike Brennan, residence Muskegon. During Mr. Comstock's absence Thomas Burry, while he was there, generally had charge of the bank; after he left I had. I can't speak for Mr. Burry whether he would pass on discounts while Comstock was absent. I used to take some paper that was offered, and some paper I would consult with the board about. The president or vice-president would sign when Comstock was absent, and I think there was a time that I signed drafts. Sometimes, when Mr. Comstock was going away, he signed drafts in blank to be used in his absence. When he was home he aimed to keep drafts signed ahead, by signing as many drafts in blank as would probably be needed for the day's business, and some of the clerks would fill them up as needed. Sometimes he inquired and sometimes he didn't into the origin and purpose of

drafts that were presented for his signature. It occasioned no surprise if he didn't. I didn't mean to say in my direct examination that his failure to inquire as to the purpose for which drafts were drawn indicated to me that he was drinking. I will say that he inquired frequently when sober, and seldom when under the influence of liquor. He did not inquire when the drafts were signed in advance, but if we ran out of signed drafts I would fill them out and present them to him for signature. A draft filled out would not necessarily tell its own story. It would show the amount, in whose favor it was drawn, and the name of the bank it was drawn on. One might inquire who purchased it, where it was to be sent, or whether it was drawn as a remittance in payment of a collection, or what was received for it. It might be important that he should know these things. It would probably be important in only
35 a small percentage of cases, but he frequently asked the question. The filled-up drafts that were presented to him for his signature would be only a small percentage of the whole. It would only have been important for him to have inquired in a small percentage of the whole. I have testified that he omitted to make inquiries about drafts presented to him for his signature when sober. I can't mention a single draft that was drawn by the bank during the time I was there, giving the date, number, amount, and payee, that he omitted to inquire about. I can't say just how often I was obliged to destroy drafts that Comstock had signed when he was drunk, because I thought his signature wasn't fit to go out. I can't guess at the number, but have done so frequently. I never destroyed one for that reason when he was sober, but have destroyed one when he was sober for reason of an error being made in filling it. It may have occurred in my own experience that drafts were destroyed because the signature would not be satisfactory, or because there was a mistake in my signature. I may have made a mistake in spelling my name or forgotten how to spell it. Drafts were sometimes destroyed for the same reason when Mr. Comstock was sober—I mean errors in filling the drafts, a blot or spoiling of the draft in some way. The mistake might be made by the person making the draft. It might be Comstock himself, or some clerk. The five cancelled drafts now shown to me, and which bear my signature in whole or in part, appear to have been cancelled because there was an error in the signature. My own error in my own signature. The twenty-eight more cancelled drafts shown to me bear my signature. There are poor signatures among those drafts. I can't say how often Comstock was in the habit of getting drunk while in the bank, but a good many times. I can't say what the average would be for the time he was here. He might keep straight for two or three months at a time, and again he might have two or three sprees in one month.
I can't say whether it would average a spree a month, it might
36 average more or less than that; I kept no record of his sprees; I had no occasion to remember how often he was drunk, but I know he was frequently; I don't know that I am qualified to name the different degrees of drunkenness. He would get so drunk that he was unable to attend to business. This condition would last from

two to ten days—probably usually from three to five or six days. After he would get over a spree he would, for some time, not look like a drinking man. I don't know whether his drinking affected his health or not. He appeared to be in good health the last time I saw him. I had been informed by parties who had seen Comstock frequently after leaving Muskegon that he was not drinking since he left Muskegon, and I saw him a short time previous to the writing of the application, and I thought he was a good risk. I recommended the risk to the company on the strength of my information and belief at that time, and with knowledge of what Comstock's past had been. In February, 1879, I called upon him at his office in New York, and I think he called at the hotel where I was stopping. I knew what his application for this insurance contained before I forwarded it to the company; I read it before it was forwarded; if there had been any statement in that application that I personally knew to be false, I don't think I would have recommended the risk; I don't think there was any such statement in it, I understood that at the time this application was made he was not drinking; I understood that he wasn't drinking then and hadn't been for some time.

Q. In the application this question occurs: "Are you or have you ever been in the habit of using alcoholic beverages or other stimulants?" and the answer is: "Yes, occasionally." You must have understood that to refer to the past, did you not?

A. I think that referred to the past.

37 Q. And as the agent of this company, and with full knowledge of Comstock's past habits, you were willing to endorse that as a true and faithful answer to the question, were you not?

A. I might not answer it in full, but was considered satisfactory.

Q. Did you consider that that would fairly describe his past habits?

A. It perhaps was not as full an answer as should have been given.

Q. Was it near enough to the truth to make a fuller answer unimportant?

A. The answer was considered satisfactory at that time.

I didn't write the application and was not present when it was written. I did not return it to have it answered more fully before sending it to the company. The bank paid all the premiums due on this policy until Comstock's death; the premiums were paid to me and by me transmitted to the company. The policy in this case was sent by the company to me to be countersigned and delivered to the bank. It bears my signature at the bottom, and it bore the signatures of the president and secretary when it was received by me.

The defendant's counsel thereupon read in evidence the re-examination of said witness in said deposition contained as having been had by defendant's counsel as follows, to wit:

At the time of the making of the application for this insurance, my principal business was that of cashier of the Muskegon National

Bank. The application was made at the instance of the bank. I signed it on behalf of the bank by authority of the board of directors. As agent of the insurance company I had no authority to accept applications for insurance—only to receive them and forward them.

Thereupon the defendant's counsel read in evidence the deposition of John Torrent, taken at Muskegon aforesaid on behalf of the defendant, on the 27th day of February, 1883, when said
38 witness, after having been duly sworn, on examination by defendant's counsel, testified as follows, to wit:

My age is 50 years; occupation, lumberman; my residence, Muskegon; I have resided here about twenty-five years. I knew Erwin G. Comstock. I became acquainted with him twelve or thirteen years ago, I think; I knew him six or seven years. I did a good deal of business through the bank he was cashier in; I kept my account there. I knew he was addicted to the use of intoxicating liquors during the period of my acquaintance with him; I have seen him drink; I have drank with him; I have seen him drunk; I have known of his being on prolonged sprees. I don't know that I could say exactly how he was affected in and by those sprees. I have seen him fall down on the street while drunk; I have seen him act out the drunkard pretty thoroughly in different ways. That habit prevailed more or less during the time that he lived here—I think all the time; it prevailed to that extent that, during those sprees, part of the time he wasn't fit for business, but he generally managed to get up a full head of them about the time business hours closed.

The plaintiff's counsel declined to read the cross-examination of said witness in said deposition contained, the same was read by the defendant's counsel as follows, to wit:

I had no acquaintance with Comstock after he left Muskegon; my acquaintance extends from 1868 to 1875. When he had not been drinking he was pretty smart, active, talkative, and of good business qualifications generally. He was an energetic man, and appeared to be a healthy man. I couldn't tell how often he had sprees; they were pretty frequent; I think he drank all the time. Sometimes he would get started and go it once or twice a week; then he may let up for a week, and the next week he might get worse and be drunk nearly all the time. I don't think he was drunk half the time; how much of the time he was drunk I should have to guess at, but I should think he was drunk one-quarter of the time,
39 safe enough; he would be pretty drunk—staggering drunk—that quarter of time. Towards the latter part of his stay here, the last two or three years, I should say the other three-quarters of the time, he was drinking habitually right along.

Q. Up to the time your acquaintance with him ceased, what would you say as to whether his drinking had affected his health or impaired his vital powers in any respect?

A. I think it had affected him materially, I think it had affected

his nerves and impaired his health generally, general debility; the symptoms of that were his general looks, and that the time he went away, or just before, he was taken very sick, and they didn't know whether he was going to be alive or die, that was the general impression.

The plaintiff's counsel objected to the reading of the foregoing question and answer, which objection was at first overruled by the court; subsequently, however, the court stated to the jury that it was of opinion, on reading the deposition of John Torrent, that its ruling was wrong, and that the objection should have been sustained, and that it was sustained; to which ruling and decision in sustaining said objection the defendant's counsel did then and there duly except.

The reading of the cross-examination of said deposition of John Torrent was continued by defendant's counsel, as follows, to wit:

I saw him during that sickness myself. It was just before he left for New York, but I don't know whether he had entirely quit the bank at that time or not. My impression is that it was about the time he left the bank. He was sick about three weeks at that time

The plaintiff's counsel here objected to the defendant's counsel reading the following sentence contained in the cross-examination of said witness in said deposition: "I think he had the delirium tremens." The court sustained the objection; to which ruling the defendant's counsel did then and there duly except.

The defendant's counsel thereupon continued the reading of said cross-examination as follows, to wit: The cause of this sickness was from drinking liquor. He was stopping at the Occidental Hotel at the time of this sickness; the latter part of it. He had a room up here in the bank building where he stopped part of the time. He general drank champagne, whiskey, and wine. During his sickness I sometimes saw him once a day, then again maybe I wouldn't see him for three or four days. I don't know as I could tell you any one who was present at any time during the sickness. For a week before he was taken away I didn't see him at all. It might have been two weeks that he was sick during which I saw him. I saw him frequently in the bank about the time he resigned, and, after that, I saw him in his own room. I called at his room to see him and talked with him. He wasn't confined to his bed when I saw him. I think his losing his position in the bank troubled him; perhaps the insanity of his wife did. I don't know how he felt towards her; he seemed to have a good many things to trouble him. I saw him fall down drunk, perhaps, not more than two or three times; those were in Muskegon. I can't give the name of any one who saw him, but there were a good many standing around. I cannot remember the name of one. One time I saw him crossing from Rifenberg's building to the Gustin block, and he fell down twice while crossing there; and another time I saw him fall down

opposite Mason's block. Those are the only times I've got in my mind just now.

The defendant's counsel thereupon further read the redirect examination of said witness in said deposition as follows, to wit:

I am a stockholder of the Muskegon National Bank. I have always held that position since the bank was organized. I
41 was one of the subscribers to the original stock. I am a policyholder in the Northwestern Mutual Life Insurance Company. I carry $20,000 insurance in that company.

The defendant's counsel thereupon offered and read in evidence, the deposition of Nathaniel A. Barney, which was taken at Muskegon, aforesaid, on the 9th day of April, 1883, on behalf of the plaintiff in this action, upon notice to the defendant and on file therein; said witness, on direct examination by plaintiff's counsel, having testified as follows, to wit:

My age is fifty-six years; my residence, Muskegon; my occupation, hotel-keeper. I have kept hotel in Muskegon for more than fourteen years. I was acquainted with Erwin G. Comstock. My acquaintance with him commenced in 1868; from the time I got acquainted with him till he went away he boarded with me off and on. To the best of my recollection, of the seven years that Comstock lived in Muskegon, he boarded with me three-quarters of the time; when he was not boarding with me I saw him frequently. He took a glass of intoxicating liquor once in a while, I should say. He became intoxicated not very often. I have seen him a few times under the influence of liquor, but never saw him so he staggered or anything like that. I should say his appearance did not indicate that he was a drinking man. I should say he was not a steady regular drinker. I should consider that he was not a hard drinker. When he did drink and have sprees, they would last two or three days. As a rule there would be long intervals between these sprees. During these sprees he was able to be up and around, and most of the time capable of attending to business. During these times he always slept well and ate well. I never discovered that his nervous system was affected by his drinking. He was a man of steady nerves. I used to call on him to drop out medicines for my family because his nerves were steady. I should say he was a healthy man,
active and vigorous. I never thought his health af-
42 fected by any drinking that he did. He did not have the delirium tremens at my house. He was boarding with me immediately before leaving Muskegon. At that time I should say he had been boarding with me two or three years. Sometimes he had rooms at my house, and sometimes he roomed out.

And the cross-examination of said witness in his said deposition contained was read by defendant's counsel, and was as follows, to wit:

Mr. Comstock commenced boarding with me in July, 1868, I think. His wife was with him at that time. My impression would

be they boarded with me then four or five months, till cold weather came. I think it was about the 1st of November, 1868, when they left; they then went to Gustin's house; Gustin was his father-in-law; after that he boarded with me again the next summer; I can't tell the date when he commenced; my impression is that his wife had gone East then; she was there a portion of the time; I can't tell how long he boarded with me that summer; I think he did not have rooms there, except occasionally; his rooms were at Gustin's; they did not room at the hotel while his wife was there; when his wife returned from the East my impression is they boarded with me for several weeks; I can't tell when Comstock stopped boarding with me in 1869. I can't tell the time when he next came to the hotel to board, but he was there off and on during the entire time that he remained in Muskegon. Sometimes he would be there two or three months, then he would be gone a little while and then come back again. I can't recollect the dates when he quit or when he commenced. From 1870, until he left in 1875, he boarded with me a good share of the time, two-thirds or three-fourths of the time, I should judge. A small portion of the time his wife was with him, but I couldn't tell how much of the time she was boarding with
43 him at the hotel. I don't know that he made his home at Gustin's almost the entire time until his wife became an invalid. I think that up to a certain time he always called Mr. Gustin's his home; he took his day board with me a good share of the time; I fitted up rooms for him in 1870, I think; it might have been in 1871; I don't recollect how long he occupied those rooms; my impression is that he gave me $100; it was not a great while he occupied the rooms; I don't know where he went to to room, but he took his day board there off and on right along just as he had; the occasion of his leaving those rooms was that his wife didn't want to live in a hotel, as he told me; he told me that he would room up at Gustin's house and he wanted day board; she would be there two or three days at a time, then she would be off perhaps a week, then on again; I did did not sleep with Mr. Comstock any of the time while he was here in Muskegon; I was not with him a great deal when he slept in Muskegon; sometimes I was; it was when he would come in and take rooms there at the house. These times that I speak of would be when he would be on these little "toots" he would come there; I would give him a room and take care of him; I would see that he was well taken care of, that he had his meals and what he wanted; I never put him to bed; he could always go to bed himself; I was not always present to see him in bed; I was generally present or had a servant to take care of him; I saw that he was taken care of; I have been with him nights when he was on one of those "toots;" I have been in his room with him; I would generally go up to his room and see that he was sleeping all right, and wouldn't go up any more unless he would send for me; I was in and out of his room pretty often when he was sick; that was on these occasions when he would have those little "toots" of his; some of the time he would be sick then; he didn't have good appetite then; he would not be sick a great while; it wouldn't last him long, some-

times two or three days and sometimes not so long; at one time
44 he was so sick that I urged sending for his folks at Pontiac; that was just before he went away, after he lost his situation in the bank; he had been on a "toot" at that time and was quite sick for several days; I guess he was confined to his room perhaps a week or ten days at the hotel; that would be my impression. I have looked for the books of my hotel, the register books and day books, and cannot find them; I last saw them about five or six years ago; about five years ago I packed up my old books into a box and put them in the cellar, but they are not there any more, nor on my premises. I don't know what has become of them; I presume they have been taken out of the cellar with rubbish. For years we kept these books in a cupboard, and then took them out and put them in a box down cellar; we didn't consider them of any consequence. It was more than five years ago. I sold a lot of stuff I had down cellar, and told my Dutchman to clean out the cellar. I suppose they were taken out by some parties I sold the rubbish to. When he was sick at my house, about the time he left Muskegon, Dr. Morrison and Dr. Marvin attended him; with the advice of Dr. Marvin, I telegraphed to his father or mother to come here, and they took him to their home in Pontiac. During these different periods when he boarded at the hotel, he was frequently away out of town; he was rather variable in his habits; he was not what you would call at that time a constant drinker.

By DEFENDANT'S COUNSEL: Q. He would have sprees of drinking or getting on "toots," as you phrase it, and keep it up till he got sick, and then he would be apt to sober off and keep until his appetite or temptation brought on another "toot," would he?

A. Well, I have known him once or twice—the time he was sick at the house there—to keep it up till he was sick, but not very often would he keep it up until he was sick. It would be my impression that he rather incined to keep out of the way when he was
45 on a "toot." I remember one or more occasions when he was confined to his rooms in the Bank block and had his meals sent there from the hotel, because he was sick. I should think he had these sprees rather more frequently during the last year he staid in Muskegon. I saw him while he was sick at his rooms in the Bank block; I don't know of my own knowledge how that sickness was brought on; my understanding some of the time would be that it was effected by too much whiskey, and some of the time it was fever and ague; that would be my idea. When he was rooming at Mr. Gustin's and he got on a spree, he would occasionally come to the hotel and take a room, when he had been on a little toot; the last time I saw him was when he was sick and went home with his mother, I think.

The re-examination of said witness in his said deposition contained, was read by the defendant's counsel, as follows, to wit:

These sprees would occur along first once in three or four months, or longer; sometimes he would go five or six months, and some of the time oftener; he was not, to my knowledge, in the habit of

drinking between these sprees; I know of his having been sick from drinking twice at the rooms on Fourth street, and two or three times at the bank building, and there at the house the last one when he was there; five or six times in all, I should say that I helped take care of him—five or six times in the course of seven years that he lived here. A portion of the time during these sicknesses he was confined to his bed; laying aside his sickness just before he left Muskegon, he was confined to his bed during those other sicknesses not very long at a time. During his last sickness, just before he left Muskegon, he would sit up in a big chair a portion of the time, and a portion of the time he would lay abed. He was not delirious at any time during that sickness, so far as I know. I think I would have known it if he had been in that condition. He always
46 conversed rationally and intelligently with me and with others, so far as I know or had any information. The trouble with him during his sickness seemed to be that he was very weak and emaciated, and by spells considerably sick at the stomach, vomiting a great deal. I have seen people with delirium tremens, and been with them. I have seen several cases; as a matter of guess work, from ten to fifteen cases. Comstock's sickness at my house was not like these cases.

By Plaintiff's Counsel: Q. Was this sickness at your house the usual sickness that followed a spree, or was it exceptional?

A. This was the worst I ever saw Mr. Comstock have by all odds. His other sicknesses lasted usually two or three days, sometimes a little longer, from two to four days, when he would be up ready for business; from two to four days would include the spree and sickness both.

The re-cross-examination of said witness in his said deposition contained was thereupon read by defendant's counsel, as follows, to wit:

Q. Don't you know, Mr. Barney, that at the time Mr. Comstock was sick at your house, just before he left Muskegon, Dr. Marvin was giving him medicine for the purpose of preventing and keeping off the paroxysms of delirium that are characteristic of the advanced stages of delirum tremens?

A. Well, I'll have to answer that by saying I don't know what Dr. Marvin gave him, except a certain item.

Q. I didn't ask what he gave him; I asked you if you didn't know he was giving him medicines for a certain purpose?

A. I suppose he was giving them for a certain purpose.

Q. For the purpose I have stated?

A. I couldn't say as to that.

The reading of the following portion of said recross-examination in said deposition was objected to by plaintiff's counsel. The
47 court sustained said objection and ordered the defendant's counsel to omit the reading thereof, to which ruling and order the defendant's counsel did then and there duly except. The portion thus omitted was as follows, to wit:

"Q. You had no understanding of that matter then, that he was trying to keep off delirum?

"A. I would say the matter was talked of between the doctor and myself about his condition, and when I went for him and took him up to the room I asked him if I had better telegraph for his mother and father, and Marvin said we better consult with him and see what he thinks.

"Q. Weren't you afraid he was going to have delirium?

"A. I was afraid he might.

"A. Don't you know that the doctor was apprehensive of it?

"A. Well, I asked the doctor and he thought there was no immediate danger. He thought he could check it so there would be no immediate danger."

The defendant's counsel thereupon called as a witness ALBERT G. WOOD, who, having been duly sworn, testified as follows, to wit:

I live in New York city; have lived there since 1875. I am a real estate broker. I knew Erwin G. Comstock. I became acquainted with him in the fall of 1876, I think. He had an office then in the Grand Hotel. He was a real estate broker. My office was opposite to him in that fall. I saw him occasionally through that winter in his office and as he came into mine. I met him every two or three days, perhaps, through the winter, and after that time up to the time that he died I saw him occasionally—there were intervals of two or three months, perhaps, in the first two years after I became acquainted with him that I did not see him. After the spring of 1877 I did not see much of him during the summer of that year. After that summer I
48 averaged once a month, perhaps for the next eighteen months, that I would see him. The first time that I met him out socially was in the spring of 1877; that was the first that I noticed of his drinking, being intoxicated; I met him on one occasion when intoxicated; that was in the Coleman House. He was quite intoxicated at that time. It was in the evening, between 8 and 9 o'clock. I met him accidentally. Found him there in the office of the Coleman House. He could hardly walk straight. He reeled as he walked somewhat. I left him at the Gilsey House. I did not escort him there, we just walked over there. I don't think I saw him again after that until next fall or winter. The next time I met him was, I think, in the following winter from 1877 to 1878, accidentally on Broadway. He was sober at that time. I met him two or three times after that. I do not remember exactly. I met him in a hotel once or twice; in the Fifth Avenue Hotel, I think. The next time I met him when he was affected by liquor was, I think, in the spring of 1878. That was on Sixth avenue between Fifteenth and Sixteenth streets. I met him on the street. He was intoxicated to a considerable extent, so much so that he could not walk erect. I did not assist him in any way. We talked a few moments and then passed on. I don't remember exactly when I next met him. Think I met him quite frequently after that, accidentally. At the time I met him on Sixth avenue he was living in Sixteenth street, I think.

During the next following summer I saw him frequently at his office in the Equitable building. I used to visit him there. He was in the mining stock business at that time. My office at that time was on Fifth avenue. During this summer I met him perhaps every two or three weeks at his office or outside. I don't remember that I met him socially during that summer. I do not remember that I saw him during that summer affected by liquor; this
49 was the summer of 1879. I am quite positive that it was the spring of 1878 that I met him on Sixth avenue This must have been the summer of 1878. To the best of my recollection it must have been the summer of 1878. During that summer I saw him at the Equitable building, where he had an office. I saw him every two or three weeks; three or four times at his office; more times on the street accidentally. I don't remember that I saw much of him during the following fall and winter from 1878 to 1879. I do not remember seeing very much of him until about 1880. I met him occasionally, but not very often, merely for a moment, speaking to him and just passing. In the summer of 1880 I met him quite often; that was in my office, No. 16 West Twenty-fourth street, at that time. I took that office in February, 1880, and am there yet. When he came to my office in the summer of 1880, I think he lived in Thirty-fourth street. He was in and out of my office frequently, perhaps once or twice a week; perhaps he would stay ten minutes, perhaps half an hour. I don't remember seeing him under the influence of liquor that summer while he came to my office. Next winter I saw him often under the influence of liquor. He had rooms over my office then and I saw him nearly every day. My recollection is that I rented him rooms there in October. I had charge of the house there and he took it from me. I think he had been about a month in his room there when I first saw him under the influence of liquor. He was very much intoxicated then, in his room, in the evening, I think. He was under the influence of liquor several times during the fall. I presume I saw him every week, perhaps. He would occasionally come in to my office, and I would perhaps go up to his room. What I have testified to in relation to seeing him on the average once a week in this condition in my office or in his rooms extends through the winter of 1880 to 1881. In January, 1881, I think he moved across the street to Dr. Beach, No. 21 West Twenty-fourth street. I think
50 he lived there about six weeks, perhaps two months. I saw him quite often then, as often as I did when he lived in the other place. He had three or four sprees while he was there, sprees that would last him a week sometimes. When he would be drunk under the influence of liquor to the extent of being helpless, at times he would fall down and be obliged to have somebody to put him to bed, etc. I have known that to last a week. The first that I observed of these sprees was when he lived where my office was. My recollection is that that lasted three or four days. I met him up Broadway; he was very much intoxicated. I helped him home and helped him to bed. The next day I went up to him, and found him sobered up some. I went to him every day or two after that, I

think. My recollection is that he was in his rooms a couple of days at that time. I think the next I was with him at any time when he was on a spree was after he had moved across the street to Dr. Beach's, where he occupied the back parlor. My recollection is that he had a spree shortly after he moved in there, a few days after, and that he was on a spree a good part of the time while he was living there. He would come home very much intoxicated, and have liquor in his room and drink it while he was there. I saw him at one time very much bruised on his limb and on the side of his head while he lived at Dr. Beach's. I attended to his bruises with liniment at that time. He was intoxicated so that he hardly knew who I was. I stayed with him until quite late that night. From Dr. Beach's he moved to Pfaff's, 32 West Twenty-fourth street. I should think he stayed there perhaps two months. While he lived there I met him about as often as I did at the other place. My recollection is, while he lived there, that he was on a spree about all the time. I think he moved to Twenty-sixth street from there. I called on him once or twice at Twenty-sixth street. I think it was
51 in April or May that he moved there. When I called on him in Twenty-sixth street he was sober. I called on him there once in the day-time and once in the evening. He was sober both times. He was away from there some little time. I think he was at the St. Omer Hotel some of the time. I saw him at the St. Omer Hotel two or three times, but was never in his room. I saw him in the bar-room; he was intoxicated then each time I saw him. I think I saw him Friday before he died; he was intoxicated then. I met him then at the corner of Twenty-fourth street and Sixth avenue, and walked back to the hotel with him. I remonstrated with him about his drinking upon one or two occasions when he was intoxicated. I did so when I bandaged his limb and his head in No. 21, but he seemed to be in such a stupor at that time that it was very unsatisfactory. After he had had these sprees I used to talk with him and persuade him to cease drinking and reform. At the time, on the Friday before his death, he was very much intoxicated; I took his arm and walked back to the hotel with him. He seemed to be in a dazed condition, and hardly knew what he was doing at that time. I think he took a glass of soda or something of that kind and then went up-stairs; I accompanied him to the stairs and left him there. Before that I saw him in Fourteenth street at Mrs. Bean's house; she sent for me. Mrs. Bean is a nurse. I found Comstock there considerably intoxicated, I think. I don't remember how long this was before his death, it might have been a month perhaps. I saw him at Mrs. Bean's but once; that was in the evening. I took him out and got him something to eat, some oysters and coffee; he drank a glass of beer I think with the oysters. I was, perhaps, an hour with him and took him back to Mrs. Bean's. He was trying to get sobered up, he said.

And on cross-examination said witness testified further as follows, to wit:

Upon the occasion of my meeting Comstock at the Coleman

52 House, I think I spent about half an hour in conversation with him. We spoke about the real estate business, both of us being in that business at that time. I never had a business transaction with him. On the occasion when I met him on Sixth avenue, that I have testified to, I just met him on the street a few moments; he was going one way and I was going the other. I think he was talking about mining stocks or something of that kind. I asked him what business he was in. He spoke of being in the mining business, I think. He talked more about being, having been, on a spree of about a week at that time than anything else that I remember of. I left him in the street. He was not accompanied by any one. He came to his house alone. I do not know how long he had an office in the Equitable building. I think, perhaps, a year. I don't think it was as long as two years. When I called on him every two or three weeks at his office in the Equitable building, I went there because he owed me a little money. I never went to see him about mining transactions or real estate. I remember drinking with him at the Coleman House at the time I met him there when he was intoxicated. We went in the bar-room, and he said join me, and I took a drink with him. He drank, too. I did not remonstrate with him at that time particularly. I did not know him well enough to remonstrate with him then. I rather did the other thing. Mr. Mason, from the bank at Muskegon, first called on me in reference to Comstock. I don't remember of anybody's ever calling upon me in the interest of the insurance company.

Q. Do you mean to say that you are placed upon the stand as a witness now without having in any way communicated to the insurance company that about which you could testify?

A. I never have communicated with them in any way. I came here to-day because I was subpœnaed. The court, I presume the insurance company, subpœnaed me.

53 Q. Had not you been given to understand in some way before you were subpœnaed what you were to testify to?

A. No.

By the COURT: Q. Mr. Parsons means, had you told some agent, some gentleman, some person connected with the insurance company as counsel or otherwise, that you know these facts? What he wants to get at is, how it was known that you knew anything about it.

A. Well, by inquiries, I presume. No one from the insurance company has been to see me in reference to the case, except Mr. Mason. I have not had any conversation with anybody upon the subject; I don't remember of anybody. Mr. Mason came to my office. My recollection is that it was the fall of 1881. Mr. Adams, the attorney for the plaintiff in this action, was with him. I don't remember what was said about Comstock at that time. They came there in reference to him, but the conversation I don't remember. They stated something of the kind at that time that a question had arisen between the bank and this insurance company concerning Comstock's habits. I never made any statement to the effect that

during the period about which I have testified he was never under the influence of drink in any way to justify an objection by the insurance company to the payment of the policy. I am positive about that. I don't remember the conversation at that time. I didn't pay much attention to it.

Q. Why did you not pay much attention to it; they came after information upon this subject, as you understood, did they not?

A. I don't know as I understood that they came for information.

Q. Well, that was two years or so nearer the time of your acquaintance with Comstock than this, was it not?

A. Yes, sir.

Q. Was not what you then stated, if anything, upon the subject of Comstock's ever becoming under the influence of liquor, according to the fact?

54 A. I don't remember making any statement of any kind at that time. What I told them was true, probably. I never made such a statement as that I had known him since 1877; that I had seen him under the influence of liquor, but never to any such extent as justified any objection by the insurance company. I have not made any statement to anybody in the interest of the insurance company about the matters in reference to which I have testified.

I know the gentleman who sits next to the defendan'ts counsel. His name is Woods. I have been acquainted with him about three years. I joined in partnership with him in the real estate business. He knew Comstock. We've talked together about Comstock. I knew he was in communication with the insurance people.

Q. How do you justify, then, what you said a little while ago to the jury, that you had never made any statement to any one in the interest of the insurance company?

A. Well, only as we had talked it over together as partners.

Q. You see him now sitting by the counsel of the company?

A. Yes, sir.

Q. And suggesting to the counsel of the company questions for your examination?

A. I did not know anything about that.

And on redirect examination said witness further testified as follows, to wit:

Mr. Woods became my partner in the summer of 1880. I was in partnership with him about a year and a half. He is not my partner now. He was with me in the office in 1880, in Twenty-fourth street, at the time Comstock lived up stairs, and when he lived at Beach's and at Pfaff's, and when he died. He saw Comstock at that time. I talked with Mr. Woods about Comstock's habits at that time. He knew that I was taking care of Comstock and following him up;

55 he knew—was aware, that I knew what I have been testifying to here. When Mason and Adams came there they wanted me to write them a letter. I declined to do it. They wanted me to state what I knew about Comstock. They did not tell me what they wished me to state in that letter. I don't remember exactly what they said in relation to it, or the conversation. I remember that

they asked me to write a letter, and that I did not write it. I met Comstock once on Broadway without an overcoat, when it was very cold. I asked him where his overcoat was, and he said it was in pawn for two dollars. I think that was in the winter of 1878 to 1879. I gave him $2.50 at that time to get his overcoat out. I am not in the habit of drinking liquors. I never drank with Comstock except the one time at the Coleman House.

And on recross examination said witness further testified as follows, to wit:

When Mr. Mason asked me to write a letter stating what I knew about Comstock and his condition, I did not decline; I told him I would think the matter over. I don't know any reason or remember any reason why I wished to think it over. I don't remember a visit that Mr. Woods once made, or stated that he was about to make, to Duluth.

Q. Did you remember some talk between you and Mr. Woods about Mr. Woods going somewhere to the West and availing of the opportunity to stop at Muskegon and see the bank people?

A. Yes, sir; I remember that.

Q. What was he to see the bank people about?

A. He was to see them in reference to the insurance.

Q. What insurance?

A. Comstock's insurance.

Q. Insurance in what company?

A. In the Northwestern.

Q. Do you mean this very insurance, the case in reference to which we are now trying?

A. Yes, sir.

56 Q. What was the talk between Woods and yourself on that occasion?

A. I don't remember the conversaion in reference to it.

Q. Can't you remember some little bit of a conversation at that time?

A. I don't remember what has been said about that.

Q. You seem to remember that there was talk that Mr. Woods should go and see the bank people?

A. Yes, sir.

Q. Does your recollection stop right there?

A. Well, I don't remember what has been said in reference to his going there.

Q. Did you remember telling anybody at the time—anybody whom you understood to be in the interest of the bank—about some arrangement between Woods and yourself, part of which was that he should go to Muskegon and see the bank people?

A. I don't remember anything more than that he was to go there. He was going there on his trip West.

Q. In this same conversation was anything also said about Woods going to Muskegon to see the insurance people?

A. I think there was something said—something about that.

Q. Were you and Woods present at that time?

A. Yes, sir; we were present at that time.
Q. Was the expense of that visit paid partly by you?
A. Yes, sir; it was made a concern expense.
Q. What was made a concern affair?
A. A concern expense.
Q. What was made a concern affair?
A. We charged the expense of the trip to the concern.
Q. I want to understand why you charged to the concern the expense of the trip which embraced both seeing the insurance people and the bank people?
57 A. I don't know; only that we charged the expense to the concern of trip.
Q. Are you able to tell the jury why it was that you were so interested about this business?
A. (No answer.)
Q. Are you?
A. I don't know—I don't know anything about it. Mr. Woods knew all about the matter.
Q. Knew all about what matter?
A. About going out there.
Q. About going out there about what?
A. About calling there on his trip.
Q. Calling there for what?
A. I don't remember exactly what he was going there for; that is, I really do not remember what.
Q. Did he actually go?
A. He went out there; yes, sir.
Q. Did he return and report to you the result?
A. I think he said he had been to the insurance company.
Q. He reported that on his return?
A. Yes, sir.
Q. Did he tell you about any arrangement he had made while he was out there?
A. No, sir.
Q. Are you quite sure about that?
A. Yes, sir; quite sure.
Q. Speak up so the jurors can hear—this is interesting.
A. He didn't say anything about making any arrangements up there; I don't remember his saying anything about it.
Q. Will you say that he did not state that he had made any arrangements with the insurance company?
A. He did not state that he had.
Q. Did you not understand upon Woods' return that you were under obligation of some kind to try and help the insurance company in this litigation?
A. No; I don't think there was any arrangment made of that kind; it was not so stated.
58 Q. The question was, whether you did not have it in your mind that you were under an obligation to help the insurance company in this litigation?
A. No; I can't say that I did have it in mind.

Q. Why can't you say so?

A. Well, really I did not give the matter much of any thought.

Q. But you gave it that much thought that Mr. Woods went out to Muskegon, saw the insurance people and at your expense and his, did you not?

A. Yes, sir.

Q. Now, sir, are you willing to tell the jury exactly what was the arrangement made between you and Woods and the insurance company at that time?

A. Well, I didn't understand that there was any arrangement made between them.

Q. How were you to benefit by the expense which you were put to for Mr. Woods' visit?

A. I dropped the whole matter; I did not think anything more about it.

Q. Yes; but I am going to take it up again and call upon you to tell the jury how you were to benefit as an offset against the expense that you were to incur and did incur.

A. I don't know as I gave it any thought how we were to benefit by it.

Q. Do you mean the jury to understand that you never gave the subject a thought?

A. I say I dropped the whole matter, and never thought anything more about it.

Q. Has any money come to your firm from the insurance people?

A. No, sir.

Q. Are you quite sure?

A. Yes, sir.

Q. Well, there is an understanding that some shall come, is there not?

A. Not that I know of.

Q. Is there none that you have heard of?

A. No, sir.

59 Q. Now, sir, do you intend the jury to understand that all this is a labor of love on your part?

A. Nothing has ever been said.

Q. A labor of love—ah. You professed to be a friend of Comstock, did you not?

A. I was a friend of Comstock's.

Mr. Woods was absent from New York about a week on the occasion about which I have testified; he did not write to me, except a postal card, I think I received; it was about the last of December, 1881. I think Mr. Mason was at my office in October or November. Mr. Woods went to Chicago and Milwaukee; he went there to see the insurance company. I don't know where the postal card is; it never was kept, it was destroyed; we usually destroy postal cards. When Mr. Mason and Mr. Adams called and asked me to make a written statement about what I knew of Comstock, I said I would think it over; I neglected the matter, and did not pay any attention to it. I spoke to Mr. Woods about their being at my office, and that they wanted me to write a letter in reference to Mr. Comstock, and

he said he was going on a trip himself and wanted to go West, and that he would go there and see them in reference to the insurance; I left it with him to see them out there. He went to the insurance company, and my impression is he went to see the bank. I have talked with Mr. Woods about this case; I knew he went out there to the insurance company. I did not know, that since then, he has has been in communication with the insurance company.

Q. What was the motive on your part to be discussing with your partner the subject of evidence available to the insurance company, and yet have no thought whatever that it should go to the insurance company?

A. We talked this over when we were partners together; being as intimate as we were with Comstock, we naturally talked the matter over, not for any particular purpose. He thought that
60 knowing him as well as he did, he might be of some use in the case.

Q. Some use in the case; some use to whom?

A. He did not say who.

Q. You had no idea, I suppose, to whom he was to be of use; is that what you mean the jury to understand?

A. Well, the fact is that the matter was left entirely with him, and I paid but very little attention to it.

And on redirect-examination said witness testified further as follows, to wit:

When Comstock died he owed me about $20, and he owed Dr. Beach about $80 for rent, which I had undertaken to collect for Dr. Beach, but which I had not collected because he could not pay it. I have settled my partnership matters with Mr. Woods; they were settled immediately after our dissolution, which was in January or February, 1882; I had a regular settlement of accounts with him. When I talked with Mr. Woods about witnesses it was after he returned from this visit West; when I talked with Woods about witnesses it was how many he knew that knew Comstock; we talked it over that way. When I remonstrated with Comstock about his drinking it was when he lived in No. 16 and No. 21 West Twenty-fourth street; he promised that he would reform and would not drink any more.

The defendant's counsel thereupon called as a witness ORLENA G. STARIN, who, being duly sworn, testified as follows:

I reside at 138 West Thirty-fourth street; have resided there for fifteen years. I knew Erwin G. Comstock. I rent rooms with board. I first became acquainted with him in June, 1880; he lived at my house from June till October of the same year; he roomed there at first for about four weeks without board, and from the 31st of July until he left, with board. While he lived there I had occasion to observe his habits in relation to being sober or intemperate;
61 he went on a spree in July; in the first six weeks he was temperate, and then for the next two weeks he went on a spree. The first that I remember of this spree was when a coachman brought him there very much intoxicated, so much so that he had to carry him

up stairs. I was in the dining room at the time. Then a gentleman by the name of Noyes, who had rooms on the same floor, wished an interview with me in the parlor, and said that a man on the same floor with him was up stairs very much intoxicated, and he had observed a strong odor of gas in the room. I went up and the door was locked, and then I climbed over the glass in the closet and got entrance into the room, and Mr. Comstock was lying helplessly drunk on the floor. I pulled him over to the bed in the alcove and lifted him on the bed and covered him up, and then I waited for Mr. Woods, his friend, to come, and told him to go up stairs and take care of his friend; by Mr. Woods I mean this gentleman sitting here in the court-room. Mr. Woods took care of him; before that Mr. Woods was in the habit of going there every night; he was a friend who came to visit Mr. Comstock often; he roomed with him at my house; he roomed with him at that time. During the two weeks of this spree I twice had occasion to go up on the second floor and found him sitting on the stairs leading to the third floor, and I spoke to him because he obstructed the way, and I asked him what he was sitting there for, and he seemed to be speechless and helpless both, and the door was not locked and I opened it and led him into his room and laid him on the lounge. Mr. Woods took care of him during this spree. I remonstrated with him during this time. I told him that the people in the house objected to living with a man weo drank, and he would have to go away. He said he would stop it; this was in the last week when he was commencing to sober up. He did not come to his meals, and I sent them to him and begged of him not to go out and be seen
62 coming in drunk, and he said if I would send for a bottle of brandy and a siphon of Vichy water he would not go out any more, and remain in the house until he got over it, and would stay in his room and not come out. I sent for the Vichy water and brandy. I do not know whether he used it. He said he had to have the Vichy water and brandy. I think he then stayed in his room. After that, I think, he remained sober for two or three weeks; it might have been a little longer. He then had a second spree of about two weeks' duration, and during that time I had occasion to go up stairs only once; my attention was called to a heavy fall up stairs, and I went up stairs and found that Mr. Comstock had fallen over a large Turkish chair, and broken the arm of the chair, and also hurt his head on the corner of the chair; his face had a big lump on it, and afterwards it discolored very much. He was very much intoxicated then and I did not attempt to talk with him. That was the only time I saw him during those two weeks. He did not come to the table during the two weeks. When I found him sitting on the steps his clothes were vere much soiled and his face much discolored.

And on cross-examination, said witness testified:

I have been acquainted with Mr. Woods from June until October, 1880, the same period as with Mr. Comstock. Mr. Woods came a few days before Mr. Comstock; he sought the rooms for Mr. Com-

stock. He came to look at them for Mr. Comstock, but he moved there with him. Mr. Woods went away first. I have not seen Mr. Woods from the time that Mr. Comstock left until I saw him here yesterday sitting in the court room. By reference to my book I find that Mr. Comstock left about October 28th. The first spree, was, I think, during the last two weeks in July. For the first six weeks that he lived in my house I think he was wholly sober; during the first spree I positively saw him three times; I think it was in the same week.

63 During the second spree I saw him, to my recollection, to remonstrate with him or to help him, only once. He was then lying on the floor in his room. I considered him a very dignified but not a fine-looking man; not imposing in my estimation. He was very neat about his dress when sober; no neater than other gentlemen.

And on re-direct examination, said witness further testified:

The reason why I fix the duration of the first spree at two weeks is because other parties in the house would have left it if I had continued to retain Mr. Comstock; but he was in my debt, and I could not reason with him or settle up any business matters in a business manner, and I was waiting for him to sober up so I could speak to him with reason, and that was two weeks from the time it commenced. He came to the table when sober always to his meals He never appeared intoxicated at the table. During the two weeks he did not appear. At the time he had the second spree he did not come to the table for two weeks. I have no other means of fixing the duration of two weeks. I said it lasted two weeks, because Mr. and Mrs. Noyes protested, and threatened to leave unless he was put right out, and then I would tell them that we would get rid of him as soon as possible, and that they told me that he was still on a spree, and I made no further attempts to speak to him until he got so that he could speak to me. He never was intoxicated when he appeared at the table. It was a table at which there were both ladies and gentlemen.

The defendant's counsel thereupon called as a witness MARY E. BEAN, who, having been duly sworn, testified as follows, to wit:

I reside at No. 332 East Fourteenth staeet. I have lived there about four weeks. My business is that of a nurse. I was a nurse in 1881. I knew Mr. Erwin G. Comstock. I first knew him in 1880. I then lived at 103 West Fourteenth street. I do not remember where I was introduced to Mr. Comstock. I had occasion to attend him professionally in the

64 last part of February, 1881, at my rooms at 103 West Fourteenth street. He was there about a week. He had been drinking when he came to me. He came to my door and said that he was feeling very badly, and asked me if he could come in and sit down for a moment. He came in and laid down on the sofa and he grew very ill before night, so that he could not get away. He said that he had been drinking, and he didn't like to go back down town. He was not able to attend to his business. He asked me to take care

of him. He seemed to be very nervous and complained of distress. He was under the influence of liquor. He couldn't walk very straight. I kept him at my rooms. He sent for one of his gentlemen friends, Mr. Wood, who is here in the court room. He came. He was the only one he sent for. He sent to his physician for medicine, that was Dr. Guernsey. He did not stay in the room all during the week. He went out once or twice. He went out with Mr Wood the night he came and came back again. I did not furnish him his meals. I do not know how he got them. He was in bed part of the time.

And on cross-examination said witness testified that she did not remember, but had forgotten both the occasion and the person where and by whom she was introduced to Comstock.

The defendant's counsel thereupon called as a witness GEORGE W HOAGLAND, who, having been duly sworn, testified as follows, to wit:

I am a broker. My office is at 52 Broadway. I reside at 120 East Twenty-fourth street. I knew Erwin G. Comstock. I became acquainted with him in January or February, 1878; I entered into a partership with him May 1st, 1878, for an indefinite period, as brokers in stocks and bonds. Our office was 62 Liberty street, the firm G. W. Hoagland & Co.; he was the company. We afterwards moved to 120 Broadway, the Equitable Building. I was in partner-
65 ship with him for one year, until May 1st, 1879. I had occasions to observe his habits with regard to being addicted to liquor. I first observed it on the last of May or the first of June, 1878. On Saturday evening he left the office all right, and Monday he did not come, and Tuesday he didn't come down to the office, so I thought it was my duty to look after him, and I went to his place of residence where he boarded, on Sixteenth street, between Sixth and Seventh avenues, and I found him drunk. He was able to walk about, but was under the influence of liquor. He was lying on the bed with his clothes on. I had a talk with him about it. I asked him first if he was sick; he said "No," then I said, "Mr. Comstock, you have been drinking." He said he had drank a little. We talked it over and I told him he must quit; that we could not continue partnership if he kept up his drinking. That is about all he said there; you could not get a word out of him at that time. I think he came down to the office Wednesday for a little while and went out again. He was not able to do business then, he only stayed down for an hour. I told him then he either had to quit drinking or else we would dissolve partnership then and there. He said he wouldn't drink any more. He wrote out a pledge himself and handed it to me. This is the paper.

The defendant's counsel thereupon offered and read in evidence the said paper, marked Defendant's Exhibit No. 3, ss follows, to wit:

"G. W. HOAGLAND & Co.,
"Brokers, Investments, Securities, and Stocks,
"No. 62 LIBERTY STREET, NEW YORK, *June 1st*, 1878.

"I pledge you not to drink any more so long as we are associated in business. "ERWIN G. COMSTOCK."

Said witness thereupon continued his direct evidence as follows, to wit:

66 As near as I can recollect that paper was written on Wednesday or Thursday. He came down on Thursday and was feeling pretty well—a little shaky. From that time out, during the time that I was in partnership with him, I did not see him under the influence of liquor again. He never stayed away from business again. After our partnership was dissolved I had once occasion to know that he commenced drinking again. That was in March, 1880. I saw him on Broadway, opposite the Grand Hotel; he was drunk; I spoke to him; I just barely nodded to him because he was with two friends and they were holding him up. He was not in a condition to be talked to. He didn't stop. I did not know who the two friends were. After that he was sick; I went to the hotel to see him after I saw him in the street. I suppose he was sick from being drunk; he was prostrated, couldn't do anything. It was four or five days after I saw him in the street that I visited him. I talked with him about his having been drunk then. He said he had been on a tear and was getting over it; that he would be all right in a few days. That was four or five days after I saw him in this helpless condition—held up by friends in the street. It was at the Grand Hotel where I visited him. After that I never saw him again under the influence of liquor. I did not see a great deal of him after that. I would see him probably once every week or ten days, something like that.

And on cross-examination said witness testified as follows:

My acquaintance with Comstock began by his being brought around to the office by some friend, and he had a desk room in the office for about two or three months. I first began to talk partnership with him about the first of May, 1878. From the time I became acquainted with him, during a period of fourteen or fifteen months, up to May, 1879, I never but once saw him under the influence of influence of liqour. The second time was in March, 1880.

67 During the time of our partnership I saw him almost every day. During the two or three months preceding the partnership I saw him almost every day. From May, 1879, until May, 1880, I saw him about two or three times a week; sometimes every day; sometimes every two or three days. I saw him in and out of his office, off and on, every day or two. From May, 1880, down to his death, I didn't see him so often. I should judge, sometimes I would see him two or three times a week, then wouldn't see him for a couple of weeks. On the Wednesday I have testified about, when he came down to the office, he was nervous and had been under the influence of liquor; it was just working off of him. I dont't think he was then under the influence of drink. This paper, the pledge, would show to a person acquainted with his signature that he was suffering from the effects of having been under the influence of liquor. He was not then, I think, under the influence of drink, but under the influence of the effects. He was in his

ordinary good condition, and all right, when he left me Saturday evening. He did not return to his office Monday or Tuesday. On Tuesday afternoon I went to see him and found him lying on the bed, apparently having experienced the effects of liquor. On Wednesday he came to the office. Our firm name was changed in October or November, 1878, to Comstock & Hoagland. He desired it and I acquiesced. He was a very capable and energetic business man, and that was so notwithstanding in the month of May or June, 1878, he had been under the influence of liquor on an occasion. During the period that he was with me, and subsequently he was very much about in the pursuit of business, very active, and brought into communication with a great many people. He knew three or four or five of the officers of the Equitable Life Insurance Company. I think he did most of his business with the Vice President, Mr. Alexander. I heard Mr. Comstock speak of a policy issued by this insurance company. I saw Mr. McLaughlin, the agent of the
68 company, at Comstock's office. He was here probably a week or ten days. He was at Comstock's office most every day during that time. Comstock went to St. Louis about some land business about February, 1879. The city of St. Louis was disposing of some bonds, and we put in a bid on them. He went out there in that interest. The Equitable Life Insurance Company were to get the bonds.

On redirect examination said witness further testified:

This handwriting in Exhibit No. 3 differs from Comstock's ordinary handwriting. He wrote a more round and freer hand than that. That is a little cramped. He was a good penman.

The defendant's counsel thereupon called as a witness ORRIN C. FROST, who, having been duly sworn, testified as follows:

I reside at 105 East Seventy-third street, in this city. I am a broker. My office is 18 Broadway. I knew Erwin G. Comstock. I think I became acquainted with him in the fall of 1875. I had bnsiness connection with him, commencing in the beginning of the winter of 1875 and 1876, and extending, I think, to January or February, 1878. We were partners in the real estate business. The firm was Comstock & Frost. Our office was first at 688 Sixth avenue, and then we moved to 1281 Broadway, under the Grand Hotel. During the time I was in business with him I had occasion to observe about his habits of drinking liquor. I never saw him drink a glass of liquor. I saw him under the influence of liquor; that is, I think it was from liquor. I am not positive, but I think it was six or eight months after our partnership began. It was at our office; I think in the afternoon. He stayed away from the office at times for days. I think he never stayed away to exceed a week. I asked him why he stayed away. He told me he was afflicted with malaria. He once told me he had been on a spree. That was, I think, in the fall of 1877, the first time. There was a subsequent time, once after that, at the time we separated,
69 either January or February, 1878. I saw him then suffer-

ing, I suppose, from the effects of liquor. I told him I was very sorry to see him in the condition he was, and that our partnership must cease. He begged of me not to dissolve the partnership. That was in the Grand Hotel. He had a room there. I went to see him; he was ill in bed. He had been away from the office three days; possibly four. He looked as if he had been through a siege of very severe sickness—very pale, dark rings under his eyes and under a somewhat more nervous state than his natural condition. On that occasion I did not say to him anything more about drinking, except that I was sorry to see him in that condition. I think I had a conversation with him subsequently about it. After we had dissolved, the day that we dissolved and notice was given of our dissolution, I told him I would like to talk with him for a little while, and then had a long talk with him in regard to drinking. The substance of what he said was that his so-called sprees were brought about by his worry and trouble in regard to his family matters. I told him that I never had been associated with a man who possessed more eminent abilities than he did, and with whom I would rather be associated in business than with him, but that if he allowed liquor to get the best of him, it was simply a question of time when it would ruin him entirely. He told me that it would never get the best of him; that it was only at these times of despondency that he drank at all, which I knew or supposed to be a fact. I don't think it was on account of his sprees that I dissolved partnership with him; it was because of the result, the consequence of his drinking, because he was incompetent to attend to business, and not because he drank, that I dissolved the partnership.

And on cross-examination said witness testified:

Q. Do you mean to be understood by the jury that Mr. Comstock was incompetent to do business when he was in business with Mr. Hoagland?

70 A. No, sir; indeed, no.

He was not incompetent to do business while he was with me. Very much the reverse, excepting at times. The first time was something like seven or eight months after we became associated in business, that he absented himself from the office for several days. The next time was in January or February, 1878 And these are the only two occurrences about which I can testify. covering, as near as I can remember, nearly two years. I did not continue to be acquainted with him after our partnership terminated. I saw him from time to time after that; I might say two or three or four times a month. I didn't see anything of him for a year before his death. Down to a period of a year before his death I saw him as frequently as I have said. When he told me that the only occasion of his drinking was on account of family troubles, he told me his wife was insane.

And on redirect examination said witness testified as follows:

I understood she was insane when he left the West. I think he absented himself three times from the office while we were in part-

nership, but only twice when I knew the cause. The third time was between the two. I think he was absent then two days. The three times are the only times that I remember. I have been very sick. I was sick for two or three weeks, quite sick. My eyesight is affected. I have not recovered fully yet.

Q. Have you had any particular occasion since you dissolved partnership with Mr. Comstock to remember or call to mind the circumstances, or have you made any efforts to forget it all?

A. I always make an effort to forget what is unpleasant.

Q. Have you in this particular instance made such effort?

A. As in other instances; yes, sir; I have, I think.

71 The defendant's counsel therefore called as a witness MATHILDA PFAFF, who, having been duly sworn, testified as follows:

I reside at 32 West Twenty-fourth street; have lived there about ten years. I knew Erwin G. Comstock. He lived in our house, but did not board there. He had the second story front room. I think he moved in there the last of January, 1881, and remained until after the first of April. I don't see much of the lodgers in the house. I saw him sometimes lying in his room on his bed, with his clothes on; sometimes it would be four o'clock and sometimes five o'clock in the afternoon. I saw him several times when he was not able to walk straight. I think it was in the afternoon. Once I found the gas-fixture in his room broken.

Q. Was there any trouble during the latter portion of his stay about his remaining in the house; was he not sent away?

A. Yes, sir.

I wanted him to go away, because I am not in the habit to keep anybody in the house under the influence of liquor. He had a key to the door of the house, but he came home two or three times and rang the bell after we were asleep. My husband had to get up, and he told him that wouldn't do, and where was his key. He apologized, and said he forgot his key in the office, and afterwards, when he came again, he said he must have lost the key, and we didn't want to give him another key, because we wanted him to leave.

And on cross-examination said witness testified:

Mr. Comstock was in our house certainly during February, March, and up to April, 1881. I could not be sure that he was under the influence of liquor. I never watch my gentlemen; but once or twice I did see it; that is the extent of my knowledge about his drinking. When I talked with him he always behaved like a gentleman; he always was gentlemanly in his manners towards me.

72 Q. Did you ever see him when that was not so?

A. Of course, if he went up in that way I never want to see him.

Q. What I wish to know is whether you ever did see him when he was not so. Did you ever see Mr. Comstock when he did not show this polite, gentlemanly bearing about which you have testified?

A. He always was to me very polite and gentlemanly whenever I

saw him. He never was sick in my house. I never knew that he was sick in my house. He always walked very fast up stairs; that was his habit in going up stairs. He was a bustling, active man when I saw him.

And on redirect examination said witness further testified:

I can't say how often I saw Mr. Comstock in our house. I did not see him every day. I saw him sometimes going out or coming in. When I talked to him I just met him in the hall. Several times; I don't know exactly how often. He said "How do you do?" and he acted gentlemanly to me as all my gentlemen do; not different from others. There were occasions when I observed a different bearing in him. He always would go quickly up stairs. But I saw him several times when he did not walk so quickly, and couldn't walk straight. I couldn't recollect how often. I once told him that his behavior—that if he drinks he could not stay in my house. He said it never would happen again.

The defendant's counsel thereupon called as a witness SARAH PARKER, who, having been duly sworn, testified as follows, to wit:

I live with Mrs. Pfaff; have lived with her for over three years. I knew Mr. Comstock when he was in the house; he was there about three months; he came at the end of January and left about the middle of April. I saw him under the influence of liquor during the time he was there; the first time he was there about three or four weeks; he was going up stairs; it was about five o'clock
73 in the afternoon. The next time I saw him under the influence of liquor was on another day, at about eight o'clock in the evening; I then saw him lying in bed with his clothes on and the door open. There was no occasion when he remained in the house for days—for several days in succession. He went out every day and came back again. I saw him other times when he was under the influence of liquor. I saw him a couple of times passing by from up stairs. He was staggering. I do not know how many times I saw him that way. I did not keep count of them. I spoke to my mistress about it several times, but not every time.

No cross-examination.

The defendant's counsel thereupon called as a witness WM. H. R. DUBOIS, who, having been duly sworn, testified as follows:

I am a stock broker, and live in Westfield, N. J.; I have an office in this city at 64 Broadway. I knew Erwin G. Comstock. I became acquainted with him about the fall of 1879; I was employed by him; his office then was at 120 Broadway. From that time I knew him until the time of his death. In about March, 1880, I saw him up at the Grand Hotel intoxicated. He was then living at the Grand Hotel. I went into his room and he told me, "DuBois, I have been on a terrible drunk, but I am not going to drink any more." I sat down, spoke with him a little on business, and then went away. He appeared entirely prostrated, nervous, and very ill; suffering, I sup-

pose, from the effects of the drunk. I never saw him after that under the influence of liquor. Up to about May, of 1880, I saw him two or three times. After May, 1880, I saw him about once in every two or three days; I met him casually in the street, passing him by. I did not go to his office or his room. I may not have seen him for four or five days, or for weeks possibly, and then, again, I
74 might see him every day. That lasted for a month or two, and then, from that time on during the winter of 1880 and 1881, I saw him less frequently. I think I saw him once; that was on Broadway, when he stopped and spoke to me.

And on cross-examination said witness testified:

During all my acquaintance with him I saw him two or three times under the influence of liquor, it was in March, 1880. It was at the same time; there was no other occasion. My acquaintance with him began in the fall of 1879, and continued down to his death.

And on redirect examination said witness testified:

In March, 1880, I saw him under the influence of liquor first in his office at No. 120 Broadway. A day or two afterwards I went to his hotel and found him drunk. I went again about a day after to see him at his hotel, and then it was he said: "I have been on a terrible drunk, but I am not going to drink any more." That was the last interview I had with him at that time. It was when he was getting over his drunk. The period covered by these three interviews that I saw him drunk was from a week to ten days, as near as I can remember.

The defendants' counsel thereupon called as a witness JAMES G. BEACH, who, having been duly sworn, testified as follows, to wit:

I reside at 14 West Twenty-fourth street, and am a druggist. I knew Erwin G. Comstock. He lived in houses that belonged to me in 16 West Twenty-fourth street and in 21 West Twenty-fourth street. He came from 16 West Twenty-fourth street to 21; that was the first of January, before he died. I think he remained there a month. He occupied the extension to the parlor. I did not live in the house; I lived at No. 19. I saw him under the influence of liquor on the 1st of January, when he had just moved into the house. I saw him in his room. His condition was, I should judge, getting over a spree. He told me he had sent for me to come
75 and see him about his eyes. His eyes had been blacked some way or other. He sent to me to see if I could not fix them up so that he could make some calls. By fixing them up I mean painting them. After he left my house I have seen him go down Twenty-fourth street staggering to the extent that he took in more than the sidewalk. Afterwards I only saw him once in that condition.

And on cross-examination said witness testified:

I heard Mr. Wood's testimony. He and I testified to the same period of time while Comstock was at my house, and during that

time I once saw him under the influence of liquor, and that was on the 1st of January, the day he came. The only other time I saw him under the influence of liquor, that I saw him staggering in the street, was in the latter part of March or April.

Redirect examination by Mr. SALOMON:

During that month of January I saw him quite frequently; not in the house, but outside of it. I saw him in Mr. Wood's office.

The defendant's counsel thereupon called as a witness ANDREW F. FARRELL, who, having been duly sworn, testified as follows:

My home is in New York, but I reside for the present in Connecticut, at Bridgeport. I am engaged as bar-tender. I've been engaged in that business for about eleven years, off and on. I knew a Mr. Comstock. I do not know what his first name was. When I knew him he was at the St. Omer Hotel, in this city, where he died about two years ago. I left there two years ago this month, and it was, to the best of my knowledge, about three or four months before that he died. I probably knew him two or three weeks before his death. At that time I was employed at the St. Omer Hotel as bar-tender. I know he used to come in there often and drink; I couldn't say how often. He used to come in in the
76 morning very often; sometimes in the afternoon he would come in, and go out after a few minutes, and come right back again; he was stopping there at the hotel. On several occasions I have seen him under the influence of liquor in the bar-room of the hotel. I remember a party going away in a carriage to Coney Island one day; Mr. Comstock was one of the party. I think there was a Mr. Cooper; I have heard that he is in the lunatic asylum, or has been. Joe White was with them; he is dead. Fred. Thorndike was one of the party; I don't know where he is. I don't remember that I saw them leave in the carriage; I don't remember that I was there when they came back. I saw Comstock again between that time and when he died; I saw him in the bar-room. He used to vary in his drinking; some days he drank more than other days; I saw him drunk during those days immediately before his death. I think it was about two or three days before he died, he came into the bar-room and drank two or three drinks, and then fell against a chair or a table. He was paralyzed at the time, and I took his jewelry away from him, his watch and chain and pin, and gave them to the book-keeper to take charge of them at the office. I think that was the last time I saw him drunk. I would not say positively, but it was just a few days previous to his death, because his watch and chain remained in the office up to the time of his death. I sent drinks up to his room, brandy and milk, and some plain brandy, too, I think. I don't remember his coming down into the bar-room during the last two days before he died.

And on cross-examination said witness testified as follows:

I have resided at Bridgeport since last June. I came from there to attend this trial. A young man came up there and gave me a

subpœna, it read for the defendant. I did not know the trial was likely to come on. Some time, about two years ago, I heard there was going to be a trial, shortly after, probably about six
77 months after Mr. Comstock's death, I think. I do not know either Mr. Wood or Mr. Woods. I know the gentleman who sits at the end of the table (Mr. Beck). I don't know what his name is. He came to see me shortly after Mr. Comstock's death. I think I have seen him probably about two or three times altogether. I think I saw him last about a year ago. We talked about Mr. Comstock. The time covered by my acquaintance with Mr. Comstock was probably three or four weeks, two or three weeks, something of that kind, about three weeks I guess. During all that time he was living at the St. Omer Hotel. The jewelry I took away from him was his watch and chain and scarf-pin. It was a gold watch, a heavy watch, and a gold chain. I think the scarf-pin was a black enameled pin with a diamond in the centre. It didn't look to be a very expensive one. It was small. I am not much of a judge of diamonds. Have no judgment of the value of that pin. I have not particularly talked with anybody about Mr. Comstock since his death, except Mr. Beck.

Redirect, by Mr. SALOMON:

No one has ever been to see me, to talk with me on the part of the bank. I do not remember Mr. Adams calling, or Mr. Mason.

The defendant's counsel thereupon called as a witness PETER TREADWELL, who, having been duly sworn, testified as follows:

I live in the town of Flushing, L. I. I was born there and have lived there thirty-five years, off and on. I am a hostler as a general thing. I have acted as a nurse. I knew Erwin G. Comstock. I first became acquainted with him in April, 1881. I saw him at the St. Omer Hotel in this city. He employed me to take care of him. He was under the influence of liquor at the time. I attended upon him for two weeks, day and night. He was not in bed all the time. He was up and down during the daytime. He was under the in-
78 fluence of liquor during the two weeks to some extent. When I first saw him he was very much under the influence of liquor, after that not so very much. I never saw him stagger but once to my recollection, that was when I first saw him. I saw him drink liquor in his room on seldom occasions for the first two or three days. He appeared to be in good health otherwise. I considered I was there to keep him from drinking much. I tried to. I did succeed to some extent. I went with him when he went down town. I understood he wanted me to keep him from drinking. He told me that he wanted to get sobered up. When I first saw him it was in the street. He was then boarding in Twenty-fourth street, and I moved his things from there to the St. Omer Hotel. I took him out walking during the two weeks. He could walk alone. I took him out walking to keep him from drinking, I suppose Otherwise he did not appear to be weak or nervous. He appeared to be worrying about something, to my mind. I came to him on the 18th of April and stayed with him about fifteen days.

And on cross examination said witness testified:

Mr. Woods sent me to Mr. Comstock and he asked if I was the man who was going to take care of him, and I said I was; and he said, "all right," and that was all the engagement that was made. He told me he wanted to get sobered up. Then I helped him. He seemed to be in good health, and all I saw was that he had been drinking. During those two weeks we went down town twice to my recollection. I went down once or twice with him. He went down once or twice alone without my accompanying him; I don't know how many times. On one of those occasions that I went down town with him he played billiards. He played with some young gentlemen that I don't know. It was opposite Courtlandt street. I think he played two games. He played billiards and pool pretty often during these two weeks. He played a medium game.

79 During all this time Comstock was able to play billiards.

That is a pretty nice game to play, I think.

And on redirect examination said witness testified:

I only remember once that I went down town with him. We went to his office, No. 30 Broad street, where we remained half an hour, I should judge. I remained all the time at his side and kept him from drinking. I think this was towards the end of the two weeks. He took his meals at the corner of Broadway and Thirtieth street. I went with him to his meals. I did not take my meals with him, but remained in the room. I do not know whether he wanted me to. I stayed with him all the time, and yet he would get drunk occasionally.

The defendant's counsel thereupon called as a witness WILLIAM J. CLOSE, who, having been duly sworn, testified as follows:

I live in Eighty-sixth street. I am a clerk in the St. Omer Hotel. Have been such about three years. I knew Erwin G. Comstock. I first knew him about April, 1881, when he came to live there at the Hotel. He was there about two weeks. I remember Treadwell's being with him. I suppose I have seen Comstock under the influence of liquor. That was about that time—around the middle of April—when he first came here. I came very little into contact with him. I saw him a few days prior to his death, about three days before he died, on a Sunday, when he took a ride. I saw him when he went out and when he came back. When he first came there, that is the only time I saw him when I thought he was under the influence of liquor.

Cross-examined by Mr. PARSONS:

My acquaintance with him began in April and continued to his death. The occasion when I supposed he was under the influence of liquor was in April, I think. I saw him every day.

80 Redirect examination by Mr. SOLOMON:

I saw him passing through the office. I talked with him. He would speak to me, bid me good morning, or something like that, and ask questions the same as any guest would.

The defendant's counsel thereupon called as a witness EDWARD A. GODDARD, who, having been duly sworn, testified as follows:

I live at Fort Green Place, Brooklyn. I am a commission merchant. I knew Erwin G. Comstock. I first became acquainted with him about in 1876. He lived in my house then for four or five months, in Brooklyn. He boarded there. I saw him under the influence of liquor two or three times. I did not see very much of him, except at the house. There were two or three evenings at the house that we noticed that he was under the influence of liquor, and, in fact, that was the occasion of his leaving the house. After that I met him, perhaps two or three times, on Broadway, as I would any one walking down the street, and I think I may have seen him in his office a few times. I don't recollect that I saw him under the influence of liquor after he left my house.

The defendant's counsel thereupon called as a witness HERBERT CARPENTER, who, having been duly sworn, testified as follows:

I am the proprietor of the St. Omer hotel, where I live. I was not proprietor thereof in 1881. My father was then. I was living at the hotel with my father then. I knew Erwin G. Comstock. He came to the hotel to live about April, 1881. When he first came there, I think, he was slightly under the influence of liquor. I saw him every day. After he had the colored boy there he seemed to get over it shortly. After the colored boy came I did not see him under the influence of liquor.

And on cross-examination said witness testified:

81 Down to within two days of his death I saw him constantly. I was night clerk. By saying that I saw him constantly I mean to say I saw him every day walking in and out of the hotel while I was standing at my desk; sometimes I would not be standing there but around the office.

The defendant's counsel thereupon called as a witness ROBERT CLARK, who, having been duly sworn, testified as follows:

I live at Canal street and Broadway. I am a hotel clerk. I knew Erwin G. Comstock in the fall of 1877 up to the fall of 1880. I was then night watchman at the Grand Hotel. About the month of March, 1880, I saw him under the influence of liquor; part of the time that he was in that condition I took care of him. I called in several times a day and several times in the evening for about a week. He kept going in and out all the time. He was slightly intoxicated part of the time; I can't say that he was considerably intoxicated; he did not stagger; he was able to take care of himself. He did not ask me to take care of him. I went there merely as a friend, not exactly because I saw him unable to take care of himself, but because I had been taking care of him previous to that, when he was ill with rheumatism; that was in 1879. I think he had it about three months in the fall of 1879. He was laid up for three weeks, that he did not go out, in the fall of 1879. He had this

spree about six months afterwards. He was over the spree in about three weeks.

And, on cross-examination, said witness testified:

My acquaintance with Mr. Comstock continued from the fall of 1879 up to the time he left the hotel, which was about the month of March, 1880. After that I did not see him for several weeks. I saw him during three years every day; probably a dozen times a day, at all hours up to 12 o'clock at night. Am quite sure that in March, 1880, I saw him under the influence of liquor.

82 And on re-examination said witness testified:

I picked up the acquaintance with Comstock first in 1879 when he was sick with rheumatism; before that time I often spoke to him in the hall at night and smoked a cigar with him. I did not see him in the daytime before that. I smoked a cigar with him almost every night at half past eleven o'clock; not during all the time of 1879. He was away three months after I went there. He was there in 1877 when I came there. My personal acquaintance with him commenced after he returned. That was three months after I came there; it was in 1878; in January, 1878, I think; it was cold weather yet. He was there possibly three months after he came back, when I commenced smoking cigars with him in the evening. That was about March or April, 1878, and continued until he was confined to his room by sickness in 1879.

The defendant's counsel thereupon read in evidence a letter from the Northwestern Mutual Life Insurance Company to L. G. Mason, of the Muskegon National Bank, dated February 6, 1882, marked Defendant's Exhibit No. 4, a copy of which is hereto annexed, and also a letter from L. G. Mason, of the Muskegon National Bank, dated February 9th, 1882, marked Defendant's Exhibit No. 5, a copy of which is hereto annexed.

It was admitted by the plaintiff's counsel that the papers mentioned in the letter Exhibit No. 5 were returned to the Muskegon National Bank.

Counsel for the defendant thereupon rested the defence in the case.

The counsel for the plaintiff thereupon, after opening the case to the jury, read in evidence the deposition of Edward B. Mather, of Muskegon, Michigan, which had been taken in behalf of the defendant on the 2d day of March, 1883, and filed in said cause, and in which said witness testified as follows, to wit:

83 My age is 48 years; my occupation is hardware merchant. I have resided in Muskegon since 1869. I knew Erwin G. Comstock. I was a director for about a year and a half in the Muskegon National Bank, but not at any time while Mr. Comstock was cashier. I knew Comstock since he was a boy or a young man; he was a little older than I, I think. I did not know him particularly well during the period of his residence here. I saw him frequently. I don't know anything personally about his being a man of economical habits or otherwise. I have heard some about his being in the habit of getting on sprees. I don't know that he had any

more reputation than other men in that respect; not than any other men, but some other men. I can't answer the question whether I ever saw him under the influence of liquor.

The plaintiff's counsel thereupon read in evidence the deposition of Sidney S. Morris, taken on behalf of the plaintiff at Muskegon, Michigan, on the 2d day of May, 1883, as follows, to wit:

My age is thirty-seven years. My residence, Muskegon, Michigan. My occupation is packer and jobber of provisions. I was acquainted with Erwin G. Comstock from August, 1871, up to the time he left here. I commenced doing business with the Muskegon National Bank in August or September, 1871. My place of business was about nearly opposite to the bank building in its old quarters. From the fall of 1872 I was in the bank daily. Previously to that I was in occasionally. I should say I met Mr. Comstock during those years daily, and some days several times. I am not aware that I ever during that time saw him when he was under the influence of intoxicating liquors. I don't know that I ever saw the man when I supposed he was under the influence of liquor during the time referred to; that is, up to the time he left the bank, his appearance did not indicate that he was a man who was addicted to the use
84 of intoxicating liquors. I continued to do business with him up to the time he left the bank. I should say as to his business methods I considered him a thorough business man, a first-class bank official. As to his deportment I should say, as far as I knew, he was a perfect gentleman, always gentlemanly. As to his personal appearance I considered him neat in his way and appearance.

The cross-examination of said witness in said deposition was thereupon read by defendant's counsel as follows, to wit:

As far as my knowledge goes I believe Mr. Comstock to have been a strictly temperate man. I believe him to have been temperate as far as my observation goes. I don't believe that during the time of my acquaintance with him he wholly refrained from the use of liquor. I am of the opinion that he did use liquor during that period. I have no reason to believe that he at any time used it to excess. The reason I have to believe that he used it at all is the fact that during those days every man indulged to more or less extent; it was a customary habit at that time in Muskegon of a great majority of the business men, presumably seventy-five per cent., if not more. I never saw Comstock drink that I recollect. I never saw him under the influence of liquor. I heard of his drinking liquor. That was by rumor, I think, subsequent to his leaving the bank. I may have heard a rumor of that kind. I couldn't say whether Mr. Comstock remained here after he left the bank one day or three months. When I testified that I saw Mr. Comstock daily I meant up to the time of his retirement from the bank, and that it was almost daily. I was sometimes out of town during that time. By almost daily I mean that I saw him frequently. That would be a substitute. I would say by frequently I might see him one week every day, and another week every other day. He could have used liquor without my knowing it; I think he might conceal his weak-

ness from me the same as I might from other men. I did not
85 see him much outside of business hours. I was not with him evenings frequently, or at his house or rooms frequently. My business in the bank was occasionally transacted with him.

Plaintiffs' counsel thereupon read the redirect of said witness in said deposition, contained as follows:

I mean to say that a majority of the business men of Muskegon were addicted to the use of liquors very moderately. When the bank was opposite my place of business I could see into the bank. I could see him occasionally there. There was a bookkeeper of the bank whose place was near the window, and I could see Comstock occasionally come up to the bookkeeper's desk.

Plaintiffs' counsel thereupon read in evidence the "agent's statement" found below, the application for insurance (Defendant's Exhibit No. 2) marked "Plaintiffs' Exhibit A," of which a copy is hereto annexed, and also the "medical examination" and "friend's statement" on the back of said application marked "Plaintiffs' Exhibit B," of which a copy is hereto annexed.

Plaintiffs' counsel thereupon read in evidence the deposition of Michael H. Brennan, taken at Muskegon, Michigan, on behalf of the plaintiff on the 12th day of April, 1883, as follows, to wit:

My age is twenty-nine years. My residence is Muskegon, Michigan. At present I am janitor of the Muskegon National Bank. I have been such janitor, take it altogether, about five years. When Mr. Comstock was connected with the bank I was janitor from October, 1874, till he left in 1875; he had rooms in the bank building from shortly after he moved from the old bank into the new building. I think that was in December;
86 I am not positive. A lady by the name of Mrs. Magilton took care of Comstock's rooms while he had them in the bank building. From the time I became janitor of the bank until Mr. Comstock ceased to be cashier, I was in the building each day and night; I slept there. I should say Mr. Comstock's habits during that time in regard to the use of intoxicating liquors were good so far as I observed. I never but twice saw him under the influence of liquor, and that was but slightly; he wasn't what you would call a drunken man; only just you could notice he had been drinking; I was around in his rooms every day. I never saw liquors in his rooms. His appearance generally did not indicate that he was a man addicted to drinking. On these two occasions when I noticed he had been drinking I think he was in condition to attend to business. During the time he was in the bank as cashier and I was janitor I usually knew when he was in Muskegon, and then he was around the bank and attending to his duties. I do not remember any occasion of his absence from the bank. He would generally be at the bank in the morning at about eight or half-past eight, and would stay there until after banking hours. His general condition as to health was good; I never heard him complain.

The cross-examination of said witness in said deposition contained was thereupon read by defendant's counsel as follows, to wit:

I have never been under the influence of liquor; I never took a drink of liquor in my life. Comstock employed me originally as janitor of the bank; my duties were to clean the building and heat it; I mean the bank building. I guess I was about 25 years of age at that time; my age now is, as I said, 29. My previous business had been firing on this railroad here; I don't know the name, Michigan Lake Shore, I think; I had been in that business I think one winter; five or six months. In October, 1874, I commenced to work for the bank; the heating apparatus was not yet in the building; I commenced working in the old bank. I don't know
87 exactly as to the date they got the heating into the new building, but I think it was in December that they first commenced. I don't know where Comstock was rooming at that time; his rooms in the new building were in the upper floor; my impression is they were fitted up about the time the bank moved, a very short time after. He did occupy those rooms sometime during the winter of 1874 and 1875. I do not remember any occasion when Mr. Comstock was confined to his rooms in the bank building, and his meals were brought up from the hotel. I think Mr. Barney was mistaken about that, from the fact that if there were any meals carried up I would generally be the one that would carry them. I never carried meals up to him. I do not mean to say that no meals could have been taken to him there without my carrying them. I remember once or twice of Mrs. Magilton taking something special that she had cooked up there, that she would like to have him eat, or something of that kind. I don't know that he was ever sick. I saw Dr. Marvin there, but whether it was a professional or a friendly visit I don't know. Comstock wasn't in bed. He didn't complain to me. He might have been sick for all I know. My rooms in the new building were in the basement. I first occupied them three or four weeks after the bank moved down. I first saw Mr. Comstock intoxicated in the spring of 1875. It was out in front of the bank building in the street. I was standing there in front of the building when he came along. He gave me a couple of dollars and told me to go to Sibley's and get a dollar's worth of cigars and bring them up to his room. It was then that I noticed he was slightly intoxicated. It was in the evening, 9, 10, or 11, or something like that. I noticed the intoxication by heaviness in his eyes and from his general gait, the way he carried himself. His gait was inclined to be a little bit rocking, not much, but slightly. His speech was not thick. That was the first that I had ever known of his drinking. I never heard
88 of such a thing before. It was a surprise to me when I saw it. He was alone. I got the cigars and took them to him. He was looking over some letters when I came in. I first became intimately acquainted with him about the time he moved into the new building. I next saw him intoxicated in June, 1875. I think he was in Belanger's saloon, standing at the bar, talking to some one. He didn't drink while I was there. I went in after he did. It was about

10 or 11 o'clock at night. We left the saloon together. I saw him go in there and was curious to know why he went there, because it was a thing I never saw him do before, and my impression was he didn't go to such places. I noticed that he was intoxicated on this occasion after I went into the saloon, but he wasn't really intoxicated—not as I understand it—not what I call drunk, just slightly under the influence of liquor. The indications that I observed that he was under the influence of liquor at that time were about the same as that I have described before. His business occasionally called him to Chicago, Grand Rapids, Pontiac, Detroit, and New York. He was absent from town more or less at some one of these places, and this occurred to some extent after the bank moved. He left his rooms in the bank building some time after he left the bank as cashier. I do not know how long after. He stopped in town after he gave up his rooms in the bank building, but I don't know how long. My knowledge of his habits is confined principally to my observation after the bank moved.

Witness says: I desire to correct my testimony as to my age when I commenced working for the bank. I was twenty or twenty-one years old instead of twenty-five, as I stated.

Plaintiff's counsel thereupon read in evidence the receipts for the payment of premiums, dated April 17th, 1880, and April 17th, 1881, marked Plaintiff's Exhibits C and D, of which copies are hereto annexed.

89 Plaintiff's counsel thereupon called as a witness SAMUEL BARROW, who, having been duly sworn, testified as follows, to wit:

I reside in New York and have resided here all my life—somewhat more than twenty-five years. I have carried on business here for twenty years. I am a vice-president of the Equitable Life Assurance Society—the second vice-president. That is the society which owns the large building at the corner of Cedar street, known as 120 Broadway. I have been such vice-president for three years. I entered the Equitable in 1869 and was secretary until three years ago, when I was elected vice-president. I was acquainted with Mr. Erwin G. Comstock. He was at one time a tenant of the Equitable building. My acquaintance with him began some four or five years ago, when he applied for an agency for the privilege of soliciting life insurance for the Equitable. I saw him frequently at that time. I heard of his death, but can't recollect when it was. I think my acquaintance with him commenced two or three years prior to his death. The general character of my acquaintance with him was that he frequently called at my office to ask questions of life insurance, and later on he became a tenant of the Equitable building, and was carrying on a brokerage business of some kind and applied there for a loan as a broker. When he was occupying an office in the building I saw him almost daily, that was, I should think, for the better part of a year. My seeing him was principally confined to that period and when he was negotiating to secure life insurance. Down to the time he became a tenant I saw him once or twice a

week. After he ceased to be a tenant I saw very little of him. I don't remember how often I saw him then. After refreshing his recollection from a letter written by him, the witness says: I recollect seeing Mr. Comstock frequently when he was there in the building; I cannot remember whether I saw him frequently down to the year or how late into the year 1881.
90 My seeing him was of so little importance that I cannot recollect now when I saw him. I recollect the man distinctly. My best recollection is I saw him within a few months of his death. Whenever he came into the office he always came into my room. I can't say how often that would be. During the time I was seeing him he struck me as a very energetic, active man, and seemed to be very industrious. He was always down at his office early, and the general impression on my mind was that he was an active man. He was a slight man, but I never heard of his being sick. He was rather particular as to his mode of dress, as I recollect him; had the appearance of a gentleman. There was no change in this regard during the whole time of my acquaintance with him. I never saw him in any such circumstances as suggested he had been drinking at all, or anything to induce any supposition in my mind that he had been drinking, during the whole period of my acquaintance with him.

And on cross-examination said witness testified as follows:

Q. When was Mr. Comstock a tenant of your building?

A. The rent book would show the exact date. I can't recollect that by memory.

Q. Was it in 1879?

A. I can't recollect the date.

Q. Was it in 1878?

A. I can't recollect the date.

Q. You don't know whether it was in 1877 or 1878 or 1879 or 1880 or 1881?

A. It must have been some time between those periods. He was there certainly six months. I think he gave up his office before the year was up, but I can't recollect the days. He occupied the back office in Pine street, in the basement. I was in his room while he was there a tenant. I don't know whether he had a partner. I saw people there generally when I went in. I probably went in there four or five times whilst he was there. As
91 nearly as I can recollect, he asked for the agency a year or two before he became a tenant. He wanted permission to advertise as a solicitor of life insurance for our company. I gave him permission. I cannot remember whether he brought any insurance. At that time when I testified that he came in frequently to talk about insurance, it was generally as to the methods of the company and his system of soliciting and plans for doing business, asking advice and explanation of others; he came in very frequently, indeed. We have printed rules of instructions for our agents, with which he was furnished. I cannot remember the subject of the special instructions he wanted, not one. It was during business hours that he would come there. I don't remember whether I was

then secretary or vice-president; but whether secretary or vice-president, I was rather busy all the time in business hours, which are from nine to four. To my recollection, I would spend each time a few minutes, I should judge, with Mr. Comstock over this discussion of the rules. During that period, when he was asking questions, I should think he was in there twenty times; it might have been forty times; hardly as few as ten times. I recollect it was not as low as that. I do not recollect the subject of a single interview. I should suppose it was a period of some months—somewhere from two to three months—that he was in the habit of coming in there to ask about these things. I don't remember whether it was during the winter or during the summer. When he became a tenant then he ceased to come in there for some time; I should think it was fully a year; it may possibly have been two years; it was quite a long time. Mr. Comstock was not a man in whom I took any particular personal interest at that time. I had no acquaintance with him further than that he came to inquire about business. The object and reason of my stopping in his office after he became a tenant was
92 that I am in the habit of going in all the offices in the building as a mere matter of inspection; that would be during business hours. I can't say that I always found him in the office when I went in; there was some difficulty about the heat in this office, and the ventilation; he was constantly complaining that the room was too hot. I couldn't indicate the number of times I was in there; it may have been two dozen times; I could not tell at all the number of times; I don't remember. When I saw him I would be in his office five minutes or ten minutes; besides seeing him in his office, I constanly met him in the hall while he was a tenant, when I was down stairs waiting to take one of the elevators to go up. I was often in the hall, sometimes once a day, and sometimes ten times a day; I don't mean that I met him every time I was down there, but I met him very often, so often that it made an impression on my mind; he was going through the hall on business apparently, and I frequently stopped and spoke to him; he would ask about the prospect of getting loans on bonds and mortgages and on collaterals. I don't recollect that I ever let him, or any one through him, have a loan. I don't recollect that his asking me ever led to any conclusion of a loan. After he left the building I have no recollection of any particular instance that I met him. After he left the building he entirely passed away from my acquaintance and from my mind. When I said I saw him two months, or a few months before his death, I meant that he was a tenant in the building until a few months before his death. My recollection is simply based upon his being a tenant of the building, and when he ceased to be a tenant I ceased to see him.

The plaintiff's counsel thereupon called as a witness HOSMER B. PARSONS, who, having been duly sworn, testified as follows:

I reside in Brooklyn, and do business at 65 Broadway, in
93 the city of New York. I am agent for the Wells, Fargo & Co., also assistant secretary. Have been such agent for eight

years. I was acquainted with Erwin G. Comstock; the acquaintance began in the early half of 1881; it continued for about five or six months. I think for four or five months I saw him for three or four times a week at our office where business brought him. He was rather tall, slight, well-dressed, very neat in his personal appearance, and apparently in good health. He was a very energetic appearing man, prompt in his business. I did not observe any change in his regard during the period of our acquaintance. He seemed to know what he was about all the time. He struck me as being a very bright man. I never noticed anything about him that he was a drinking man. No suspicion ever crossed my mind from anything in or about him that he ever had drank liquor at all.

On cross-examination said witness testified as follows:

I became acquainted with Comstock at our office at No. 65 Broadway. I do not remember the day. He came in and intimated to me that he wished to do some business with us. He represented a mining company, or had some connection with a mining company. He wished to have some shares deposited with us to be held subject to certain instructions which were filed with us; that is to say, they were to be held by us subject to delivery to him upon the fulfillment of certain conditions. Those shares were deposited; I couldn't give the date; it was early in that year; we have books from which I could tell the date. I have been inquired of before in relation to this matter; it was when I was requested to write some letter for him. I did write a letter. I don't remember to whom it was addressed. My recollection is that Mr. Adams, plaintiff's attorney, applied for it; that was a year or a year and a half ago; on one has been to see me since then upon the subject. When I said before that it was in the early part of 1881 when I made Com-
94 stock's acquaintance, I meant that it was in the month of February, March, or April; my recollection is it was some few weeks after he first came that the stock was deposited; between the time that he first came and the day that the deposit was made I saw him quite frequently; I did see him again; I have no distinct recollection of seeing him as to the day, but I recollect him coming in there quite frequently before the stock was deposited. I have no recollection of a distinct interview. To the best of my recollection, he was there when the deposit was made; a committee appointed by the mining company made the deposit; Mr. Mullet, the architect, was one of the committee. The interview lasted half an hour, I should think. My recollection is that Comstock was present, but I am not positive. I had no other business transaction with Comstock, except in connection with this stock; the stock was not withdrawn before he died; it was after his death; except the deposit, he came in frequently with regard to it. He would come in sometimes to report progress in what he was doing; we had nothing to do with the progress. I knew the terms of the deposit; I don't remember what they were; they were nothing more than that the stock was to be surrendered to him upon his fulfilling certain conditions—the payment of money; he was at liberty, if I remember rightly, to

withdraw the stock as he liked, so much a share upon the payment of so many dollars per share. I don't remember that he withdrew a single share; I could not say positive. I do not remember how much he was to pay for a single share; I think it was a little over a dollar a share; the arrangement was that if he wanted a certain number of shares he could have them upon payment at the rate of a little over a dollar a share. He did not come to talk with me about anything else except these shares of this deposit; there was no other matter of business between me and him. He often
95 talked with me about business generally and about mining. My functions as agent of the company keep me very busy. As to the number of times he was there talking with me I can only say that he was there very frequently; I should say that he was there fully twenty times at all times during business hours; sometimes two or three times a day. I do not remember what he said in a single instance. I remember having seen the man; what he talked about I don't remember.

Plaintiff's counsel thereupan called as a witness CHARLES B. HAINES, who, having been duly sworn, testified as follows:

I reside in New York, where I have lived for five years; I am at present a clerk in the City Bank. I have altogether done business here for twelve or fourteen years. I knew Erwin G. Comstock; he was introduced to me by a friend in February sometime; I think it was in 1881, the year of his death. My acquaintance with him continued for about four months; down to June, 1881. I saw him almost daily with reference to business as a broker. I was a broker at that time. I saw him at my office in his room in West Twenty-fourth street. I went to his rooms socially. I dined with him at Delmonico's and at Hotel Brunswick; once at each place; he was rather below the medium height, and appeared to be perfectly healthy and strong. I did not see any indication of illness in him at any time, with the exception of a week or two. I think it was a week or two prior to his death when I saw him in the office of the St. Omer Hotel, where he was staying. I notice that he was not looking as well as the last time I saw him, but, it being in the evening and gaslight, I couldn't see distinctly. Never during this period of my acquaintance with him did I see any indication in him that he had been drinking or was under the influence of liquor; I do not know of anything at all to start a suspicion on my mind that
96 he might have been drinking; when we dined together we may have have had a little claret; that is all.

And on cross-examination said witness further testified as follows:

Mr. George Newman, who now lives in Colorado, I think, and was interested in mines, Mr. Comstock's friend, gave the dinner, at one time, and Mr. Nixon, my partner, and myself at another time; the first dinner was about the time I met Comstock, in February; I do not remember whether it was towards the first or latter part of February. I do not think that it was in March, on account of the time

that Mr. Newman was with us. I think he went to Colorado in April. There were a number of weeks between the time of meeting Mr. Comstock and the time that Newman went away, more than four weeks. I do not remember what part of April he went away. The dinner Newman gave us was at Delmonico's. The dinner lasted probably an hour; afterwards, I think, we adjourned to Mr. Comstock's room in West Twenty-fourth street. His room was on the second floor, the front room, on the south side of the street, it was an even number. He lived there during the whole time that I knew him, except when I found him at the St. Omer. The number of the house was either 30 or 32. I was probably in his room three or four times. I do not remember the date at all when that was. I think it was spread over two months at least. He invited me specially every time I went. The second dinner was, I think, the second week before Mr. Newman went away. It must have been the latter part of March or the 1st of April, Mr. Newman was also present, and it was at Cafe Brunswick. The dinner lasted about as long as the first, and after it we also adjourned again to Mr. Comstock's room. I don't remember having been in Comstock's room after that. I had business transactions with him. He bought stock through us. Probably there would have been fifty transac-
97 tions. They commenced from between two and six weeks after we met him, and took place up to within two or three weeks prior to his death. No transaction took place after I saw him in the St. Omer. I can now remember at least a dozen distinct transactions. I cannot give the date of any one. I don't remember whether they took place within a week of each other. We had transactions nearly every day, but I would not be willing to state that there was not a whole week when there were no transactions between us. I am willing to swear that there was not during this time a whole week when I didn't see him, except a week or two prior to his death. I would not be willing to swear so positively. I think that there could not have been more than one or two weeks, during the time that I knew him, when I did not see him. I do not think there were three times, each time a week in duration, that I did not see him. I have not seen my books. I do not know the number of times that we received orders to transact business, and such a length of time has elapsed that I cannot remember. When he came to our office to transact business he may have remained a half an hour; he generally remained a few moments. He made friendly calls upon me.

The plaintiff's counsel thereupon called as a witness JAMES H. GOODSELL, who, having been duly sworn, testified as follows:

I reside in West Fifty-eighth street, New York; have lived there nearly fourteen years. I am a publisher and printer. My business is at 16 Dey street. I was acquainted with Erwin G. Comstock. Our acquaintance began when he was three or four years of age, and continued all his life. As nearly as I can recollect I should say that the last time that I saw him was two weeks before his death. He came here from Muskegon about 1874 or 1875. I was then living

here. From that time on to two weeks before his death were periods when I saw him almost daily, at other times perhaps twice
98 a week. The last three years of his life I saw him I should judge an average of two or three times a week, and prior to that I saw him at longer intervals, of a week, perhaps, or two weeks, I saw him at his place of business. He called upon me at my place of business occasionally, frequently. My acquaintance with him began at Pontiac, Michigan. In appearance he was a man who was remarkably neat as to his dress and care of his person. His habit was that of a nervous man, quick, very active, very decisive in his methods of carrying on business; quick to decide a point, and he used to dispatch a great deal of business. He used to have a great deal of business on hand. It was sometimes difficult to get his attention on account of his being engrossed in business. He was a thin man, medium stature, and always seemed to be possessed of a great deal of nervous energy and strength, but did not strike me as a man having a capacity for hard continuous work that perhaps a more robust man would possess. There was no change in his apparent health during the period of my acquaintance with him. I never saw him drunk. I have heard reports that at times he would drink. I never saw him under the influence of liquor or indicating in any way that he had been drinking at all. I was present on one occasion, I think, in Delmonico's on Broadway, when he was invited to drink. I should say that was within six months of his death. He declined to drink. About this time I had a conversation with him on the subject of drinking; I brought to his attention the story I had heard, and he replied to me that he was not in the habit of using liquor, and never did use it except to alleviate physical pain and distress. I understood from him that he was a sufferer from sciatica. I did not notice, towards the last of my seeing him, that he was suffering from depression. Within the six months preceding his death I noticed nervousness, or something which struck
99 me as being unusual; it was within two months of his death, I should say; he came to my office on that occasion, and I observed that he was very nervous and depressed—he spoke that way; I observed no indication that he had been drinking. During the last three or four months of his life his office was on Broadway, near Exchange Place, No. 62, I think.

On cross-examination said witness testified as follows:

I left the West in 1870; Comstock and I were about the same age, about 28 years at that time. I had not seen him for two or three years when I left the West. I lived at Chicago, where I moved to in 1861; then I came to New York, and have lived here ever since, except two years in Brooklyn. I saw Comstock in Chicago two or three times during my residence there; that was before 1870. I think I did not see him at all after I had removed to New York until he came here to live. From 1878 backwards, during the years after Comstock came here, I saw him; he did not visit at my house; I am married and have a family; he never visited me at my house. During the years preceding the three last years I should

say it would be in the average once a week that I would see him, as nearly as I can recollect. During that period he was at one time engaged in the real estate business and insurance soliciting business under the Grand Hotel on Broadway; I called on him there once. When he removed to his office at 120 Broadway, in 1877 or 1878, I called there quite frequently. Prior to his moving to 120 Broadway I saw him many times. I saw him at my office in regard to matters in which he was interested. He had bonds to sell of Western towns; that was in 1876 or 1877. It may have been within a year or three years after he came to New York, that he called in relation to this business; he wished me to give him some letters of introduction to officers of insurance companies in Hartford, to an officer that I knew.

I think he called three times in connection with this matter.
100 I can recall no other specific occasion when he called on me.

He made friendly calls on me; I think I recollect two or three times specifically that he called on me. All these calls were during business hours. I never saw him socially at any time; I was never at his rooms. I called at his office, at 120 Broadway, within a week after he first went there. I do not know of his ever having a partner there. I had business transactions with him while he was there; he and I were both directors of the Consolidated Pay Rock Mining Company; it was organized in the fall of 1879, I think. He and I were also members of the executive committee of that company; my impression is, from the time of its organization. The committee would meet, in the average, twice a month, in the daytime, during business hours. I had other business transactions with Comstock; I bought some mining stock of him on one occasion. Prior to the organization of that company I had no business transactions with him, but I made some friendly calls upon him at his office, not less than five times, I should say. From the time of the organization of that company I called at his office some weeks daily, and then at intervals two or three times a week. I was out of town in the summer of 1880 from the middle of August until near the first of October, and I went out of town over night or for a day or two besides. From the fall of 1879 until the following August, 1880, there never was a week that I did not call upon Comstock at his office; I am positive of that. I am not positive that I always saw him. There may have been a week or weeks during that period when, although I called, I did not see him. My calling in that way on him continued from October, 1880, until the time when he removed from the Equitable building; that was in the spring of 1881, I believe in February or March. From October, 1880, up to the time he removed to 62 Broadway, I should say I called on him once a week, in the average; besides that, I saw him on the street during the
101 day time, or met him occasionally on the cars. From the time that he moved to 62 Broadway I called at his office five or six times, I think. I did not find him every time I called; I recollect that I found him three times, but cannot specifiy the dates. I saw him shortly before his death, a week or two at the farthest, in my office, during business hours. I recollect that during the months of March, April, and May I was interested largely in the disposition

of the stock of this company, and it was my business as a member of the board of directors to attend to the raising of funds for carrying on the work, and I recollect having frequent interviews with Mr. Comstock during that period; how frequently, I can't recollect, but it was every week, certainly. The conversation with Comstock about his drinking habits was at Delmonico's eating house, during lunch time, about one o'clock. After he refused to drink on the invitation of another gentleman, I told him that I had heard that he was drinking, and asked him if it was so, and he said it was not so. He said that he never used liquor, except to alleviate his pain; that he could not endure the use of liquor; it affected him immediately, and he found that he had to cease the use of it wholly. That was before I moved from 120 to 62 Broadway; shortly before such removal; within three or four months of such removal. I believe it was subsequent to January, 1881.

Plaintiff's counsel thereupon called as a witness GERALD R. BROWN, who, having been duly sworn, testified as follows:

I am manager of the Equitable Life Assurance Society building and private secretary of the second vice-president. I was acquainted with Erwin G. Comstock in a business way. He occupied the office in that building from September 3d, 1878, until February 1st, 1881. I was in the habit of seeing him passing through the hall, and had to call upon him to collect the rent. When I passed him in
102 the hall I at times passed the time of day with him. He was a man of medium height, rather slender than otherwise; dressed very elegantly when I saw him. He always struck me as being very energetic—a sharp, shrewd, business man. His health always appeared good to me. He was always the same. I think that he sprained his ankle at one time, when he used to come to the building in a cab; that is the only change I can remember. I never saw anything about him to justify the charge that he was a man of intemperate habits. He looked to me like a man who did not drink. From September 3d, 1878, to February 1st, 1881, I would see him frequently passing through the halls, and I called on him once in three months to collect the rent, but I can't say how frequently; perhaps I saw him two or three times a day, and then perhaps again I would not see him for a day or so.

And on cross-examination said witness testified as follows:

I don't think there were whole weeks that I didn't see him. I was away for a couple of weeks in the summer; I did not see him then; I simply say I did see him frequently; I will say that there may have been a number of weeks in which I didn't see him. I don't think the room was rented to Hoagland & Co.; it was rented to Mr. Comstock alone; the lease is in the name of E. G. Comstock. I can't state whether I saw him in the month of January, 1881, but I know I saw him during the winter of 1881, passing through the halls; it may have been in December, 1880.

Plaintiff's counsel thereupon called as a witness ABRAHAM B. MILLER, who, having been duly sworn, testified as follows:

I live in the Park Avenue Hotel in this city; have lived here the last time since 1877; have been connected with two hotels here since then, the Grand Hotel and the Park Avenue Hotel. E. G. Com-
103 stock was a friend of mine; I became acquainted with him in Baltimore in 1862; I knew him from 1862 to 1865, and from 1873 to 1875, and from 1878 to 1881; from 1878 to 1881 I knew him in New York; during that time he lived at the Grand Hotel, where I was a clerk. From 1878 to 1880 I saw him about twice a day, and during the last year of his life probably once a week or once a fortnight. I never saw him under the influence of liquor, and only saw him take one drink; that was when the big whale was down here at the dock, and we took a drink together; he drank ale and I drank whiskey. Nothing ever occurred about Comstock in his appearance or manner which led me to suspect that he was a drinking man; he was the personification of neatness and tidiness, and had a general business way about him and was always in a hurry. I was in his room upon one occasion when I understood he had been under the influence of liquor, but he had not that I could see.

And on cross-examination said witness testified:

That was probably in the winter of 1880 at the Grand Hotel; he was there until the summer of 1880; he left there when I was away at Saratoga, where I went from June to September. He came to Saratoga and passed a fortnight or some days, I do not remember just now. Robert Clark, the night watchman, told me that he had been dissipating upon the occasion I spoke of. I do not mean to say I saw him twice every single day; sometimes he would go to Boston two or three days, and to Baltimore, and to Washington. I think I saw him twice a day from the time he was there; if he had been so drunk as to be dazed and to be unable to walk without staggering, and to be unable to talk except incoherently, he could not have kept that from my observation.

Plaintiff's counsel thereupon called as a witness JOHN M. NIXON, who, having been duly sworn, testified as follows:

104 I am a stock broker; my office is 61 Broadway. I have done business in this city for the last four years. I had acquaintance with Comstock; it began in the early part of 1881, in February, I think. I think I saw him two or three days before his death at his office. Down to this last occasion I would see him most every day, and sometimes two or three times a week. He was introduced to us by one of our customers, Mr. Newman. The business of buying and selling stocks brought us together. He was about medium size, always looked very nice, dressed very well generally, was active and quick in his motions, and always seemed to be straightforward and to understand what he was about always. As to his apparent health, he always seemed to be pretty well. I never saw him under the influence of liquor. I never saw anything

about him which indicated that he had ever drunk a drop of liquor in his life.

And on cross-examination said witness testified:

I was a partner of Charles B. Haines at that time. Newman invited us to a dinner at Delmonico's. It was about a week after he introduced Comstock to us; I have no recollection of seeing him (Comstock) between the time he was introduced and the dinner. The dinner which Haines and myself gave afterwards was, I think, the latter part of April or May, because it was just before Newman went away, and he left about that time, I think; that is just an impression I have. Between the time the first dinner was given and the time that the last dinner was given I saw Comstock very rarely, if at all, except upon business matters. I remember meeting him once in an afternoon, about six o'clock, near Fifth Avenue Hotel, in the street; it was a casual meeting; that is the only time that I met him, except upon business, between those dinners. The period that I saw him more than once, or once a day, was the latter part of March or April; it was through the whole month of April. I do not say that I am positive about that. I am not positive that I saw him during the last two weeks of April every day.
105 I could not say and do not remember so as to be willing to state how often I saw him during the first two weeks of April. I cannot say how often I am willing to state that I saw him after the 18th day of April and until the last day of April.

Q. Will you swear that you saw him once between the 18th day of April and the first day of May?

A. My impression is that I did. It was at my office during business hours. I bought some Boston consolidated stock for him. I do not remember the exact date. It may have been before the 18th day of April. As to the rest of the time when I said that I would see him two or three times a week there may possibly have been some weeks that I did not see him at all. My business called me on the board most of the time during the business hours of the board, between ten and three, so that I was not always in my office. My impression is that I saw him two or three days before his death, in his office, in relation to some stock. The transaction came to nothing, and I have no entry in my books about it to refresh my recollection. I heard of his death, and it surprised me very much that he had died so suddenly. My impression was that I had seen him just a couple of days before.

Plaintiff's counsel then read in evidence letter of the president of the defendant corporation, dated February 11th, 1882. It was marked Plaintiff's Exhibit E.

Plaintiff's counsel thereupon called as a witness LYMAN G. MASON, who, having been duly sworn, testified as follows:

I am a director of the Muskegon National Bank. I was first a director in 1871, I think for about five years, and then I was not a director for three years, I think. I again became a director in

July or August, 1880. The letter February 9, 1882, (Defendant's Exhibit No. 5), was sent by me and written under my direction.

I became acquainted with Comstock in 1869. I saw him
106 last in March, 1881, in New York. He left the bank in 1875. I heard read by defendant's counsel the deposition of Barney, and what he said about an occasion contemporaneous with Comstock's leaving the bank, when he appeared to be under the influence of liquor. I remember that time. I noticed that at that time Comstock was under the influence of liquor. It was about three months after he left the bank. He left in July and this was in September. At this time he was under the influence of liquor not to exceed two, three, or four days—a short time. Prior to that time and covering the whole period of my acquaintance with him, I had seen him slightly under the influence of liquor. I do not know on how many occasions. From 1869 to 1875 it was six years, and it was not very frequent. I recollect two or three occasions. One was at the opening of a hotel, I think, several years prior to 1875. There was a jollification there on that occasion. It was a summer resort, ten or twelve miles from Muskegon. People from here and other parts of the country met there. I noticed then that Comstock was under the influence of liquor, slightly so, not very badly. It was so with others that were there. Some worse than he, a good deal. Afterwards I remember an occasion here in New York, I think, there may have been other occasions prior to 1875, when I saw him, showing that he had been drinking. Nothing more than I described as slightly. I never saw him incapacitated for business. After he came to New York in 1875, I never saw him under the influence of liquor. I never saw him drink anything, except a glass of cider. I think I was in New York some half a dozen times until his death, and saw him each time. On one occasion I was two days with him, and then I left him and went to New England and came back, and was with him two or three days after. Several other times I was two or three days with him. I stayed at the same house with him—at the Grand Hotel and at Mrs.

Pfaff's in Twenty-fourth street. I stayed at Mrs. Pfaff's
107 house three or four nights. I was there on two occasions in March, 1881. During no part of the time when I was at Mrs. Pfaff's house was Comstock under the influence of liquor, nor was he at any time at the Grand Hotel when I was with him. I took meals with him on those occasions. He drank nothing. I won't say that I didn't. I don't recollect but one occasion that I drank anything when he was present. That was at Delmonico's, the occasion that I spoke of. A great many gentlemen were around, taking wine and such things.

And on cross-examination said witness testified as follows:

The capital stock of the Muskegon National Bank is $200,000, of which I hold ten per cent. I was one of the original stockholders. I signed the friend's statement on the application which is marked Defendant's Exhibit No. 2. I have never been president of the bank. I am a director simply. I have had charge of this case from the

board of directors. This is the third time I have been in New York in connection with this case. I came here shortly after Comstock's death; within a month. I then saw all those whose affidavits we took as proof of death that we furnished the company. Mr. Adams, an attorney, assisted me in getting the proofs. I think it was in December, 1881, when I came down the second time. I was here several days then. I then saw some of the witnesses who were called here for the plaintiff, and I saw others in relation to the matter. I saw Mrs. Pfaff and talked with her. Mr. Adams was with me one evening when we went to her. I had Mrs. Pfaff sign a paper that was drawn up. I saw Mr. Egan, who was a nurse in the last sickness of Comstock, and got a statement from him which I got him to sign. I did not submit Egan's statement to the company. I got three statements of persons which I did not submit to the company; possibly four. I have never seen the physician since the proof were taken,
except this time down here in court. Dr. Messemer was in
108 court talking with defendant's counsel a day or two ago.
I have not seen him till then since the proofs were taken. There was another physician, his name was Dr. Duflo; he signed the certificate that was with the proofs of death that were put into the insurance company. The three persons whose statements I did not submit to the company were Eagan's, the nurse, Mrs. Pfaff's, and the other nurse that attended Comstock in his last sickness. I saw him in court here during the trial. He told me he had been subpœnaed by the other side. He was here in attendance a day or two. I had his statement. My impression is that it was sworn to. The three statements I refer to were affidavits written down by Mr. Adams, sworn to and kept by him. During the two or three days when Comstock was under the influence of liquor, about three months after he had left the bank, he was in Muskegon, at the Occidental Hotel. He was not in his room all the time. I saw him in front of the hotel and on the street. When he went away with his father and mother, I bid them good-bye, and walk to the omnibus with them. Comstock was in good health, but he was not entirely sober. I would not say that he was under the influence of liquor at the time, but he was perhaps nervous and suffering from the effects of liquor. It was at this time that he had been under the influence of liquor two or three days. During the time that he lived at Muskegon I very often saw him evenings. I saw him very seldom under the influence of liquor while he was cashier of the bank—from two to six times a year; six times would be the maximum—very seldom during the daytime.

Q. Did you ever see him upon any of the occasions when for several days he was confined to his rooms by reason of sprees or "toots," as the hotel keeper stated?

A. I don't think there was any such occasion that I remember.
After he left Muskegon, I saw Comstock in New York, in
109 1876—I think I did, at the Grand Hotel, or at rooms he was
ocucpying in Thirty-second street.

The witness here desired to refresh his memory by referring to

his deposition taken at Muskegon, in this case, and was allowed to do, and thereupon continued to testify as follows:

I saw Mr. Comstock in New York in February, 1877. I was here on the 23d, 24th, and 25th of February, and saw him on those three days at the Grand Hotel, at his office in the Grand Hotel. I was with him most of the time. I find no memorandum of where I was in 1878, or that I saw him in New York in 1879, and have no recollection of seeing him either in 1878 or in 1879 in New York. In November, 1879, I saw him in Chicago by appointment. I was with him two days in Chicago then. I next saw him in September, 1880, at his office here, and went down to Coney Island with him. I was here then at least two days. I do not recollect whether I stopped at his rooms at that time. I do not know where he roomed; I stopped with him wherever he stopped. The next time I saw him was in March, 1881. I came from Washington here, and was with him the 8th and 9th and the 13th and 14th of March, 1881. Then I stopped with him at Mrs. Pfaff's. That is the last time I saw him. The paper that I have been using on my examination is a deposition in this case taken on behalf of the insurance company at Muskegon.

And on redirect examination, said witness further testified:

I saw Mr. Wood when I was in New York, at his place of business in Twenty-fourth street. I heard his testimony as to what took place; I asked him for a written statement of what he knew about Comstock, and he promised to write me a letter. He never did. I recollect that he said that if this defendant expected to make that sort of a case to prove Mr. Comstock a drunkard, they would have up-hill work, and he claimed to know all about it. I don't
110 think I ever saw Mr. Woods, the partner of Mr. Wood, until I saw him here in court. A letter written by him inviting an interview was sent to me. I did not go. I have seen Dr. Messemer in the court-room during this trial talking with Mr. Salomon. He has not been examined as a witness for the defense. The two nurses whose statements I took I saw in the court-room. I did not ask them to come here. They have not been examined as witnesses upon this trial.

Thereupon the plaintiff's counsel rested his case.

The foregoing is all the testimony produced at the trial of said action.

The court thereupon charged the jury as follows, to wit:

GENTLEMEN OF THE JURY: This is an action upon a policy of life insurance for the sum of $20,000, issued by the defendant on the life of Erwin G. Comstock for the benefit of the plaintiff, a creditor of said company, in the sum of $20,000.

The execution of the policy on April 17th, 1879, the payment of two successive annual premiums thereafter, the death of Mr. Comstock on June 29th, 1881, the rendition of proofs of loss, and the existence of the debt amounting to $20,000 are all admitted.

The defendant, taking the affirmative and the burden of proof,

seeks to establish one or more of these defenses, either one of which if proved to your satisfaction would be sufficient.

First, that the application for the policy was made in writing by Comstock and by the plaintiff, acting by William B. McLaughlin, its cashier, and it was, in substance, a part of the contract of insurance that any materially untrue or fraudulent answers to any of the questions, or any suppression of facts in regard to Comstock's health or habits, which facts were material to the risk, should avoid the policy; and it is claimed that it was a fact that Comstock, at and before the time of making the application, was habitually
111 intemperate; and that the answer in the application that he drank liquors occasionally was untrue in this, that it implies that he drank liquors only occasionally, and was not an habitual and intemperate drinker of alcoholic stimulants; and that thus facts material to the risk were suppressed.

The second defense is that the plaintiff entered, in the application and policy of insurance, into a promissory warrant that Comstock should not become habitually intemperate, and that the policy was issued and accepted upon the express condition that if he should become either habitually intemperate, or so far intemperate as to impair health, the policy should be void; and that, after the making of the policy, he did become habitually intemperate, or so far intemperate as to impair health.

Upon the first defense, it is true that any untrue or fraudulent answers, or any suppression of facts, which are the subject of inquiry in the application which were material to the risk, have the effect to avoid the policy. It sometimes becomes a question, in an application of this kind, what extent of misrepresentation makes an answer materially untrue. The answer which we have is that he drank liquors occasionally. Now, I do not think you will be troubled by considering a question of that sort; for it is not contended by the defendant (that is, by the insurance company) that if Comstock only drank liquors occasionally, though such drinking might be somewhat beyond the bounds of strict prudence and temperance, and cause a thickening of the tongue and an imperfection in the gait, at the moment of a temporary and occasional and brief excess, such a use of liquors would be a violation of the answer in the application.

Neither, on the other hand, is it contended by the learned counsel for the plaintiff that frequent debauches, lasting for days and accompanied by physical prostration and nervous derangement, are justly and truly represented by the answer: "I drink liquors occa-
112 sionally." So, it is sometimes questioned as to the class of facts, the suppression of which becomes important in the case. While the materiality to the risk of the facts which are suppressed is a question of fact for the jury, there would be no controversy, I suppose, that when the question of the use of intoxicating liquors was presented, and Comstock, as a matter of course, knew the facts in the case if he was, at the time of making the application, the victim of an appetite which impelled him to frequent and prolonged sprees, or to the frequently recurring, violent and excessive use of alcoholic liquors for days, that such a fact was one which was mate-

rial and important to the character of the risk which the defendant company was assuming.

Another point to which I call your attention is: That the knowledge of McLaughlin that Comstock was intemperate, if such knowledge existed, makes no difference in regard to the invalidity of the policy. He was an applicant, and if he (McLaughlin) knew that he (Comstock) was not telling the truth, that is immaterial, although he was, in addition to being the applicant, the agent. Therefore the real question upon the first defense is: Was Comstock, at and prior to the time he made the application, habitually intemperate? Or, in other words, was he in such frequent use of intoxicating liquors that the practice of drinking to excess had become a habit to which he was subject?

The second defense presented the same question. At the time subsequent to the application did Comstock, after the policy was issued, become habitually intemperate, or so far intemperate as to impair his health? If he was at or prior to the application, and when I say "before the application" I mean for such a consecutive time up to the time of the application as to create a habit of life—habitually intemperate, habitually indulging in violent excesses in the use of liquors; or if he was, after the date of the policy, viz., after April 17th, 1879, habitually intemperate, or so far in-
113 temperate as to impair his health. In either of those events the policy was avoided, and your verdict must be for the defendant.

The third defense relates to death by his own act, and I shall submit to you do question upon that branch of the case, as I do not think that the testimony shows that Comstock drank with the intention of killing himself, so that the question at issue relates solely to intemperance.

Before considering the testimony, however, I desire to make a suggestion, which is that this question relates to a breach of contract. The plaintiff agreed and covenanted that Comstock should not become an habitually intemperate man, and if he did, that the policy of insurance was to be at an end; and the simple question in this case is: Was there a breach or not of the contract? If yes, the policy is void; if not, the policy is good. And the question is to be determined, like other questions of a breach of contract, by a preponderance of evidence; and the fact that the triers may think such an agreement to be an unwise agreement or contract should have nothing to do with the decision.

The defendant, necessarily taking the burden of proof, seeks to establish by a fair preponderance of evidence that Comstock was, at the time I have named, habitually intemperate. The defendant does not seek to show that in the ordinary and daily course of life he made an excessive use of intoxicating stimulants; but it seeks to show that, periodically and frequently, his appetite led him to prolonged "sprees" or debauches, in which he consumed an excessive quantity of liquor, from the effect of which he became nervous, sick, and weak, and that these periodical sprees recurred with more frequency and with longer duration during the last year of his life,

until the final, and perhaps most severe one, which the defendant claims was speedily followed by his death.

I think that there is no rule of law which says that,
114 in order to make a man a drunkard, he must drink every day or every week to excess. Neither, on the other hand, does a single or an occasional excess make a man an habitual drunkard; but, if you find that the habit and rule of a man's life is to indulge periodically and with frequency, and with increasing frequency and violence in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness. It is the fact of the certainty of these periodical sprees accompanied with their frequency which marks the habit. If a man should indulge in such a debauch once in a year only, it could not, in my opinion, properly be said that he was an habitual drunkard; he would be an occasional drunkard. But if such debauches increased in frequency, and the certainty of their increasing frequency becomes established, then the time finally arrives when the line between an occasional excess and habit is crossed. It is for you to say whether Comstock was at the time of the application, or became afterwards, the victim of such a habit.

Now, recurring to the testimony, the defendant starts with Comstock's residence in Muskegon. It claims that, while he was a resident there, and before he left for New York in the year 1875, he was subject to periodical attacks of intemperance; and to support that claim, they have introduced the testimony of Mr. McLaughlin, Mr. Torrent (which you may recollect, perhaps, from the fact that he styled himself a "lumberman"), and the hotel keeper. Perhaps they have introduced others also, but these three strike my memory as more important. The claim is that you con see, from the testimony, that his residence in Muskegon terminated in an attack something like delirium tremons, which compelled his parents to be summonsed to see him and take him away.

And the defendant says that, in a man of mature years, the habit once formed rarely ceases to exhist; and that, in New York,
115 the testimony of Wood and Goddard shows that he occasionally, in 1876–7, indulged, somewhat freely at times, in stimulants.

I do not remember that it is claimed that, prior to the fall of 1877, he had what is called a "spree;" that is, a prolonged attack. But it is claimed that in the fall of 1877 he had one of these sprees; that, in January or February, 1878, he had a "spree," when Frost dissolved partnership with him; that in June, 1878, he had another spree, when Hoagland obtained his pledge that he would abandon drinking, which Mr. Comstock probably must have kept for something like a year or more. During that interval this application was made and signed. In March, 1880, Robert Clarke testifies that he took care of him for a week or more after this spree. At this time, you recollect, Mr. Dubois went to see him, and found him in that condition. Mrs. Starin testifies that in July, 1880, and in August, 1880, or about that time, with two weeks intervening, he had two occasions of this sort. In January, 1881, which was the

time he went to Dr. Beach's house and took rooms there, you recollect the testimony of both Dr. Beach and Mr. A. G. Wood as to his condition. In February, 1881, Mrs. Bean, the nurse, testifies that he voluntarily placed himself under her care, and that she attended to him after one of these attacks.

In April, 1881, he has the nurse Treadwell for something like two weeks after an occasion of this sort; he voluntarily put himself under the care of the colored boy, so that he might be kept from the further use of liquors. In June, 1881—that is, immediately preceding his death—Farrell testifies in regard to his habits at the St. Omer Hotel.

Those, gentlemen, are, so far as I recollect, the periods in 1880 and 1881, which are relied upon by the defense to make out their case.

If you find that, after the making of the policy, Comstock became so far intemperate as to impair his health, the policy is avoided, and the verdict will be the same—for the defendant.

116 The evidence in regard to the fact that he became intemperate to the degree of impairing his health is the same as I have just recited to you.

Now, turning to the evidence on the part of the plaintiff, the bank denies that Comstock's habits at Muskegon were excessive; and, in this part of the case, they rely very much upon the testimony of the janitor of the bank and upon the testimony of Mr. Mason, and, perhaps, the testimony of others; but as those two persons would naturally have observed his habits, their testimony strikes me as more important on the question whether his habits were intemperate, and habitually so. It says that between 1875—that is, the time when he left Muskegon—and the date of the policy, in April, 1879, he substantially reformed, and that he stopped in June, 1878, when he gave to Hoagland his pledge, which was kept so long as he was in business with Mr. Hoagland. And so they say that there was nothing suppressed or untrue, in April, 1879, in the application; but that when he said he drank liquors occasionally he told the exact truth, and there was nothing at that time, after an abstinence of say ten months, which would call for any remark on his part.

Next, they go on, and having, as they say, satisfied you by this fact that he had not drank, substantially and materially, when he made the application, for ten months, they say it was true.

Now, you will look afterwards, and see whether he violated his promise and in the future became an intemperate man.

In the first place, they criticize some of the witnesses of the plaintiff; they criticize with some assurance the testimony of Mr. A. G. Wood and the testimony of Mr. Farrell. They also criticize the testimony of Mr. McLaughlin; but, as I have passed that issue, I will not dwell upon that.

Next, as to his habits in regard to temperance after the date of the policy, the bank says that his health during this time was apparently unimpaired; that he went about among his business acquaintances after his temporary lapses; that he appeared

117 well and strong and vigorous, and showed no indication to

his business companions and associates of any lack of vigor or any sapping of his vital powers; and they say that, admitting what the defendant says to be true, it shows but occasional lapses from temperance, and that these occasional lapses had not become a habit of his life. That, in the spring of 1877, Wood and Frost testify in regard to his intemperance—that is, when they saw him drunk upon the street in the evening; that, in June, 1878, he had a "spree" at the time Mr. Hoagland testifies; that in the spring of 1880 he had another fall; again in the summer of 1880; again in January, 1881; and also between January, 1881, and April, 1881, according to the testimony of Mrs. Pfaff and Mrs. Bean; and again in June, 1881, according to the testimony of Farrell and Treadwell.

And they say that, taking all these things together, it ought not to satisfy you that he had become habitually intemperate or a victim of intemperance.

Upon this part of the case the difference between the plaintiff and the defendant is in regard to the stress and interpretations which you will put upon the testimony of these various witnesses; that is, how much stress and weight you will give to the testimony in March, 1880, of Clarke and DuBois; in July, 1880, and August, 1880, to the testimony of Mrs. Starin; in January, 1881, to the testimony of Beach and Wood; in February, 1881, to the testimony of Mrs. Bean; in April and June, 1881, to the testimony of Treadwell and Farrell, as to how violent, how prolonged, and how excessive were his habits. Were his lapses from temperance only slight, or were they of the character which the witnesses for the defendant described? It seems to me the point of difference between the plaintiff and defendant is upon the weight which you give to the testimony of the defendant's witnesses.

Then, I desire to call your attention to the positive testimony
118 of the plaintiff as given by Messrs. Goodwell, Nixon, Barrow, Parsons, and Miller. Their testimony is perhaps fresh in your recollection, and it is criticised, not in regard to its truthfulness, but because it is said to be unconsciously exaggerated and colored; and it is furthermore said that it is consistent with the testimony on the other side; that it may be perfectly true that these witnesses whom I have named, who were his business companions and associates, and who saw him only in the day time during business hours, might never have seen any indications of liquor upon him, the testimony upon the other side being that at the times when he concealed himself from the observation of the public he was suffering from the excesses to which the nurse, Mrs. Bean, and the colored boy, and perhaps Farrell and others, have testified.

If your verdict is for the plaintiff, it will be in the sum of $22,905.

I am asked by the defendant to charge you: "If the jury find from the evidence that Erwin G. Comstock was habitually intemperate when the application for the policy of insurance was made, then they must find for the defendant." Which is true.

"If the jury find from the evidence that Erwin G. Comstock became habitually intemperate after the issuing of the policy, then they must find for the defendant." Which is true.

That, "if the jury find from the evidence that after the making of the policy Erwin G. Comstock became so far intemperate as to impair his health, then they must find for the defendant." I have already charged you in accordance with that request.

The bank desires me to charge you that the burden of proof is upon the defendant, and if the jury are of opinion that defendant has failed to make out the defense which they have pleaded, the verdict must be for the plaintiff. Which is true.

"If the evidence shows that the defendant knew the evi-
119 dence showing the circumstances and cause of Comstock's death, and that they withheld it, the jury are justified in assuming that it would not aid the defendant's defense." Gentlemen, I am obliged to say to you that that is a request which is a two-edged sword; that it was just as competent for the plaintiff to call these witnesses as it was for the defendant.

That "if the witness Wood has testified falsely in respect to any material fact, or is proved to have endeavored to conceal any connection or relation between him and the defendant in reference to the case, the jury may consider that in weighing his testimony." I charge you, if he has testified falsely in respect to any material fact; or is proved on the stand to have covered up or concealed any connection or relation between him and the defendant, you may take that into consideration.

That "it is only habitual intemperance, or intemperance so far as to impair health, which is material." I charge you that.

Upon the plaintiff's exception to the expression "a two-edged sword" in said charge, the court said: "I withdraw the expression 'a two-edged sword;' it is too sharp; I do not like it. I will simply say that it was competent for either side to have called those gentlemen." And upon the plaintiff's counsel also excepting to that part of said charge which defined habitual intemperance to be such lapses of intemperance as described by defendant's witnesses, the court said: "That I did not mean to say, if I did say it. The court did not intend to instruct the jury one way or the other; the court did not intend to have the jury infer that there being the state of things described by defendant's witnesses, they should find for the defendant; the charge was intended to be on general principles."

The defendant's counsel thereupon requested the court to charge the jury as follows, to wit:

To be habitually intemperate it is not necessary that a person
should be addicted to the excessive use of intoxicating liquors
120 continually, or without interruption; but a person who, during a period of time sufficient to form a habit in that respect, is addicted to periodical "sprees" of longer or shorter duration, when for days in succession he drinks intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness compel a cessation, and terminate the "spree," comes within the definition of being habitually intemperate, although such person may remain sober for a month, three or six months, or even a year at a time.

The court refused so to charge, to which refusal the defendant's counsel did then and there duly except.

The defendant's counsel further requested the court to charge the jury as follows, to wit:

If the jury find from the evidence that for seven or eight years immediately prior to the 17th day of April, 1879, Erwin G. Comstock was addicted to periodical "sprees," when for several days and sometimes for a week or more in succession he would drink intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness intervened, then they must find for the defendant, although they may find that he would remain sober for a month, three or six months, or even a year at a time.

The court refused to charge the jury as requested, to which refusal the defendant's counsel did then and there duly except.

The defendant's counsel thereupon requested the court to charge the jury as follows, to wit:

It was the duty of the plaintiff and of Erwin G. Comstock in their application for this policy of insurance to communicate to the defendant the fact that for six or seven years immediately prior to the first day of June, 1878, Comstock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, although he might remain
121 sober for a month, three or six months, or longer, even, at a time; and their failure to disclose such facts to the defendant avoids the policy and the jury must find for the defendant.

The court refused to charge as requested, to which refusal the defendant's counsel did then and there duly except.

The defendant's counsel thereupon requested the court to charge the jury as follows, to wit:

If the jury should find from the evidence that for six or seven years immediately prior to the first day of June, 1878, Erwin G. Comstock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, until sickness and prostration would intervene and terminate the spree; that such sprees would occur once in every three or six months or thereabouts; that on the first day of June, 1878, after termination of one of such sprees, under threat of dissolution of partnership from his then partner, Mr. Hoagland, he gave a written pledge not to drink any more so long as he and Hoagland were associated in business; that his partnership with Hoagland ceased on the first day of May, 1879; that afterwards, during the years 1880 and 1881, he again became addicted to such periodical sprees; that during the year 1880 he had at least three such sprees; that during the year 1881, up to the latter part of April of that year, he had a number of such sprees of great intensity; that in one of those sprees, in or about the month of April, 1881, he subjected himself to the restraint of a nurse for several weeks in order to

prevent himself from obtaining liquor; then the jury must find for the defendant.

The court refused to charge as requested, to which refusal the defendant's counsel did then and there duly except.

The defendant's counsel thereupon requested the court to charge the jury as follows, to wit:

122 If the jury find from the evidence that after the making of the policy of insurance during the years 1880 and 1881, Erwin G. Comstock became addicted to periodical sprees lasting for a number of days, or even a week or more each time, when he would use intoxicating liquors to such extent and excess as to produce continued drunkenness, and prostrate him and make him sick for several days; that such sprees occurred in or about the month of March, 1880, in or about the month of July, 1880, again in or about the month of August, 1882; again on or about the first of January, 1881; again in or about the month of February, 1881; and again in or about the month of April, 1881; that his last sprees in February and April, 1881, were of such intensity that towards the close of the drinking period, when sick and prostrated, he subjected himself to nurses for a week and more each time, in order that they might assist him to become sober, then they must find for the defendant.

The court refused to charge as requested, to which refusal the defendant's counsel did then and there duly except.

The jury having rendered a verdict in favor of the plaintiff, the defendant's counsel moved the court to set aside said verdict, and for a new trial upon the foregoing exceptions, and because the verdict is contrary to the weight of evidence; and thereupon the foregoing case and bill of exceptions has been made and settled in order that said motion may be heard thereon, with leave to turn the same into a bill of exceptions.

The attorneys for the plaintiff and the defendant appearing before me and consenting to the settlement of the foregoing case and bill of exceptions, it has this day been settled and signed. It is hereby ordered to be filed.

Dated New York, December 11, 1883.

N. SHIPMAN, *Judge.*

DEFENDANT'S EXHIBIT No. 4.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
MILWAUKEE, *February 6th*, 1882.

L. G. MASON, Esq., *Muskegon, Mich.:*

123 DEAR SIR: Your favor of the 3d inst. in relation to the loss under policy No. 99,256 is at hand, and contents noted. The package by express, containing the additional proofs you desire to lay before the committee, was received in the midst of the business incident to our annual meeting, and when it could not be submitted to the committee until last Wednesday. Had it reached us two or three days earlier it would have been submitted to and

disposed of before the interregnum in the meetings of the committee. I regret the delay, but it was simply unavoidable.

Your communication and accompanying documents were all submitted to the committee at the very first meeting at which they could have been submitted after their arrival, which, as I have said, was on Wednesday last, and you were not advised of the action of the committee for the reason that in the press of business incident to this season of the year and in connection with our annual meeting, I have not been able to reply until now. The committee gave a full consideration to the whole subject, read and considered all the proofs heretofore furnished and all the additional, and after a careful consideration of the whole subject, did not feel themselves authorized to change their former action. The company is, by the terms of the contract, under obligations to refund all the premiums paid upon this policy, and this we are ready and willing and offered to do. We suppose, however, with your views of the case, you will feel disposed to accept repayment of the premiums, and I know of no better or more satisfactory way to bring the matter to a conclusion, than for you to bring a suit against the company. Then the facts in the case can be established by evidence taken upon examination and cross-examination of witnesses, and the truth can be ascertained. Our information is so widely at variance with that which you have received, that I see no other way, as much as we regret a litigation to arrive at the truth. Should the evidence, when taken, in our judgment establish your theory, we should have no hesitation
124 in adjusting the matter without subjecting you or ourselves to the expense of a trial; and should it, in your judgment, establish ours, I have no doubt you would be willing to take the same position.

Yours truly, (Signed) H. L. PALMER, *Pres't.*

DEFENDANT'S EXHIBIT No. 5.

MUSKEGON NATIONAL BANK,
MUSKEGON, MICH., *Feb. 9th*, 1882.

Hon. H. L. PALMER,
President Northwestern Mutual Life Ins. Co., Milwaukee, Wis.

DEAR SIR: Your favor of the 6th instant relative to the claim of the Muskegon National Bank, under Policy No. 99,256, is at hand, and contents noted.

The bank was and is anxious to arrive at only the truth of the matter in controversy between it and your company, and to that end proposed a joint inquiry as to Mr. Comstock's habits, which, for some unaccoutable reason, you refused; and with a view of avoiding litigation, we also frankly laid before you the results of inquiries we then made on our own behalf. These statements, made by reputable persons, cover the whole period during which Mr. Comstock was insured, and are met by you by the bare assertion that you have other information inconsistent with that which we have obtained. We feel that it was due to good faith and fair dealing that you should have informed us wherein we are supposed to

have been misinformed, and inasmuch as you declined to do this, we are constrained to believe that, without justifiable grounds and under pretense of a strict observance of the contract, you are yourself seeking to evade its performance and to require us to compel the payment by law of that which you should have paid honorably and of your own accord. Your offer to refund the premiums is no tempation to us. We are entitled to all the calls policy for or nothing.

The papers sent you last month, and which you incorrectly style "additional proofs," were sent at your suggestion to lay before your executive committee, and now that they have been used for that purpose, I request that you will return them to me by next mail.

Yours truly, L. G. MASON,

Of Special Committee appointed by and on behalf of Muskegon National Bank.

PLAINTIFF'S EXHIBIT E.

NORTHWESTERN MUTUAL LIFE INS. CO.,
MILWAUKEE, *Feb. 11th*, 1882.

No. 99,256, E. G. Comstock.

L. G. MASON, Esq., *Muskegon, Mich.:*

DEAR SIR: In compliance with the request in your favor of the 9th inst., we herewith return the papers received with yours of January 16th, ulto., purporting to be copies of affidavits, letters, &c.

Yours truly, (Signed) H. L. PALMER,
President.

DEFENDANT'S EXHIBIT 1.

No. 99256. Age, 37. Amount, $20,000. Premium, $567.00.

The Northwestern Mutual Life Insurance Company by this policy of assurance, in consideration of the representations made in the application therefor, and of the premium in advance, as herein stipulated, consisting of the annual cash premium of five hundred and sixty-seven $\frac{00}{100}$ dollars to be paid at or before noon on or before the 17th day of April in every year during the continuance of this policy, doth assure the life of Erwin G. Comstock, Banker, of New York, in the county of New York, State of New York, for the benefit of Muskegon National Bank, creditor, in the amount of twenty thousand dollars, for the term of his natural life.

And the said company doth hereby promise and agree to pay the said sum assured, at its office, to the said beneficiary or its successors or assigns, in sixty days after due notice and proof of death of the said person whose life is hereby assured, (the balance of the year's premium and the amount of all other indebtedness to the company on account of this policy, if any, being first deducted therefrom.)

At each distribution of the surplus after two years from the date hereof, a due proportion of such surplus on each and every year's

business, during the continuance of this policy, will be returned to the said assured.

And the said company further promises and agrees that, if after three or more annual premiums shall have been paid in cash, default shall be made in the payment of any premium or interest on the day it shall become due, it will issue a paid up non-participating policy for an amount calculated in accordance with the table then used by the company for such purpose, provided this policy be then freed from all indebtedness to the company, and provided also that written application be made therefor, and this policy and all interest therein be surrendered, within six months from the date of such default.

This policy shall not take effect and become binding on the company until the premium shall be actually paid, while the person whose life is assured is in good health, to the company or to some person authorized by them to receive it, who shall countersign the policy on receipt of the premium, and is issued and accepted by the parties in interest on the following express conditions:

1st. The person whose life is assured is permitted to travel by the usual routes to or from California, or to or from any portion of the Western Hemisphere north of the Tropic of Cancer, or to or from any portion of Europe, and to reside within said limits north of the Tropic aforesaid.

2d. If the said person shall pass beyond the aforesaid limits, or shall be personally engaged in blasting, mining, or sub-marine operations, or in the production of highly inflammable or explosive substances, or as engineer or fireman on any locomotive engine; or in switching or coupling or uncoupling cars; or be employed in any capacity on the trains of railroad, excepting as passenger or sleeping car conductor, mail agent, express messenger, or baggage master, or in ocean navigation, excepting as master, mate, or pilot of first-class steam or sailing vessels plying between the ports witnin the limits before mentioned; or shall enter or be engaged in any military or naval service whatsoever (except in time of peace), or shall undertake an aerial voyage, without in each or either of the foregoing cases having first obtained the written consent of the company, or shall die in consequence of a duel, or of the violation or attempted violation of any law of any Nation, State, or Province, or shall become either habitually intemperate or so far intemperate as to impair health or induce delirium tremens, or shall, whether sane or insane, die by his or her own hand or act, or if any of the statements or declaration in the application for this policy and upon the faith of which it is issued, shall be found in any material respect untrue, then, and in every such case this policy shall be null and void.

3d. If the said premiums shall not be paid on or before the days above mentioned for the payment thereof, then, and in every such case, this policy shall cease and determine; and no premium on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president or secretary, and the payment and receipt of any premium less than a full annual, shall not have the effect to

continue this policy in force longer than three months in case of a quarterly payment, or six months in case of a semi-annual payment.

4th. In every case where this policy shall cease or become null and void, all payments thereon shall be forfeited to the company, except as above provided, and except that, in case the person whose life is assured die by his or her own hand or act, the company shall return the premium received, less dividends paid.

5th. If the said assured becomes habitually intemperate, or so far intemperate as either to impair health or induce delirium tremens, then and in either such case the company may cancel this policy and thereupen be absolved from all liability upon the same, except only for the "surrender value" thereof, computed according to the practice of the company, which surrender value it will pay on the surrender of this policy, if applied for in the lifetime of the assured, and within one year after the cancellation of the same.

6th. If this policy is assigned or held as security, a duplicate of the assignment shall thereupon be given to this company, and due proof of insurable interest produced with proofs of death.

In witness whereof, The Northwestern Mutual Life Insurance Company, at its office in Milwaukee, Wisconsin, has by its president and secretary, signed and delivered this contract, this seventeenth day of April, one thousand eight hundred and seventy-nine.

(Sig.) H. L. PALMER, *President.*
WILLARD MERRILL, *Secretary*

Countersigned by —— ———, *Agent.*

Life–2–H.* Oct. 17th, 1878.

127 [This folio is a form of "Application to the Northwestern Mutual Life Insurance Company," with the questions the same as appear on folio 129, the answers being all cancelled.]

McK., *Clerk.*

128 Endorsements on 127 as follows:

The Northwestern Mutual Life Insurance Company.

No. —. Amount, $———
Life of —— ———, — day of ———, 18—.

Read this Statement with Care.

This policy is payable at death of the person insured. Premiums payable during life as follows:

$—— cash payable —— on the — day of ———, ——.
—— ———.

Total annual premium, $——.

At the third annual renewal the dividend of the first year will be due, and can be applied as cash towards the payment of the third year's premium, or if the party insured is at the time in good health may be used for purchasing full paid additional non-forfeiting insurance due and payable with this policy at death, or temporary in-

surance expiring at the end of one year, and due and payable in case of death during that year.

If payments of premium are discontinued at any time after this policy has been in force three years, it can be exchanged for a full paid policy (on which no further payments are required), as stated in the body of the policy, provided this policy be then freed from all indebtedness to the company, and provided also that written application for such exchange be made to this company within six months after lapsing of this policy.

If you change your place of residence and post office address, please notify the company immediately.

Life–2–H.* Oct. 17th, 1878.

Agents having the receipts, and then only, will receive the premiums when due or before; but agents are not authorized to waive forfeitures, to make, alter, or discharge contracts, and no receipt will be binding on the company, unless signed by one of its officers and countersigned by the agent.

No agent has any authority, in any case, to waive or postpone payments of premiums, and the assured is hereby notified that the only evidence to him of the authority of any agent to receive any premiums on account of this policy, is a receipt in printed form signed by the president or secretary of the company.

If a premium is received by the company after the day named in the policy for its payment, it is considered by the company and the assured as an act of grace or courtesy, ond forms no precedent in regard to future payments.

Surrender of Policy.

—— —, 18—. For a valuable consideration, the receipt whereof is hereby acknowledged, we surrender to The Northwestern Mutual Life Insurance Company the within policy, No. —.

—— ——.
—— ——.

N. B.—To be signed by the insured and the person for whose benefit the policy is made.

Receipt in Full.

Received, —— —, 18—, of The Northwestern Mutual Life Insurance Company, —— dollars, in full of all claims on the within policy.

129 DEFENDANT'S EXHIBIT 2.

(Copy of the application upon which this policy was issued.)

Policy form ——. No. 99256.

Application to the Northwestern Mutual Life Insurance Company.

An answer to each of the following questions is required from ap-

plicants proposing to effect insurance on their lives in this company which answers form the basis of the contract:

1. Name at full length of the person for whose benefit the assurance is affected—Muskegon National Bank; residence, Muskegon, Mich.; relationship to person to be assured, creditor.
2. Name at full length of the person whose life is to be assured—Erwin G. Comstock; residence, New York city, county of New York, State of New York; post office address, 120 Broadway; occupation, banker broker. What occupation has the person been previously engaged in? Banking. Has health suffered therefrom? No.

☞ In giving the occupation of the person, it is not sufficient to state (for example) that he is a merchant or mechanic, but the particular branch of business, or the actual trade, must be specified.

3. Are you now assured in this company? If so, what is the number of the policy, and for what amount? No.
4. Place and date of your birth—Pontiac, Michigan; day, 7; month, Feb'y; year, 1842; age nearest birthday, 37.
5. Are you married? Yes.
6. Have you been vaccinated? Yes. Have you had the small pox? No.
7. A. Have you resided out of the United States? A. No. B. If so, where and for what period? B. ——.
8. A. Are your parents living? If so, what are their ages and state of health? Father, yes; ages, about 66; state of health if living, fair. B. If dead, at what ages, and of what disease did they die? Mother, no. B. Age at death, can't say. B. Cause of death, can't say, about 30—I was about 18 mo. old.
9. How many brothers have you had?—Whole No., 3; No. living, 2; ages of living, about 28 & 30; state of their health, ——; No. dead, 1; ages at death, can't say—don't know; cause of death, can't say whether he is dead, haven't heard from him since 1859. How many sisters? Whole No., 1; No. dead, 1; age at death, can't say—infancy.
10. A. Have your parents, uncles, aunts, brothers, or sisters been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or any other hereditary disease? A. Not that I know of. B. Have your ancesters generally reached old age? B. Yes. Ages of grand parents, p. g. f., p. g. m., m. g. f., m. g. m., can't say.
11. Have you ever had any of the following diseases, or any symptoms thereof? Spitting blood, bronchitis, rupture, liver complaint, gravel, rheumatism, asthma, apoplexy, gout, scrofula, insanity, paralysis, consumption, dropsy, vertigo, bilious colic, cancer, fistula, fits, piles, eruptions, or diseases of the skin, palpitation, or diseases of the heart, of the urinary organs, or of any vital part. If you have had one or more of these diseases, please state particularly which, when, how severe, and

whether fully recovered, and answer "No, as to all the rest." No.

12. Are you subject to dyspepsia, dysentery, or diarrhœa? No.
13. Have you ever had an habitual cough? No.
14. Are you now subject to or affected by any disease or weakness, or have you had any severe disease, or received any serious injury other than those stated in the foregoing answers? If so, please state the particulars of the same fully, prefixed by the words "none except," ——. No.
15. Are your brain, nervous and muscular systems, lungs, heart, abdominal and urinary organs in a healthy state? Appear to be.
16. A. Are you, or have you ever been, in the habit of using alcoholic beverages or other stimulants? A. Yes, occasionally. B. Are you engaged in any way in the sale of alcoholic liquors? B. No.
17. How long since you were attend by any physician? For what what disease? Give name and residence of such physicians? never had any regular physician.
18. Name and residence of an intimate friend, to be referred to for similar information. L. G. Mason, Muskegon, Mich.
19. Policy amount, $20,000; kind, life; how paid—annual, semi-annual, or quarterly. Annually.
20. A. Is your life now assured? And, if so, for how much, and in what company? A. Aetna; $1,000. B. Have you ever been declined by any company; if so, why? B. No. C. Has any officer or agent of any life insurance company, or any physician, ever given any opinion that you were not safely insurable? C. No.
21. It is also declared that the above-named beneficiary has an interest in the life of the person whose life is proposed for insurance, to the full extent of the amount of insurance applied for.
22. Have you read and assented the following agreement? Yes.

It is hereby declared that the above are the applicant's own fair and true answers to the foreging questions, and that the applicant is not, and will not become, habitually intemperate or addicted to the use of opium; and it is hereby agreed by the undersigned that that these statements, with this declaration, shall form the basis of the contract with the Northwestern Mutual Life Insurance Company for assurance, and that any untrue or fraudulent answers, any suppression of facts in regard to the applicant's health, habits, or circumstances material to the risk, or neglect to pay the premium on or before the day it becomes due, shall vitiate the policy, and forfeit all payments made thereon. Such failure to pay, however, shall not forfeit the amount secured by previous payments on a non-forfeiting policy, and inasmuch as only the officers at the home office of the company, in the city of Milwaukee, have authority to determine whether or not a policy

shall issue on any application, and as they act on the written statements and representations referred to, it is expressly understood and agreed that no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations, or information shall be reduced to writing, and presented to the officers of the company at the home office in the above application. I further agree that under no circumstances shall the policy be in force until the actual payment to and acceptance of the premium of an authorized agent of the company while I am in good health.

23. A. Do you desire the company to assume the risk on this application from this date, provided application is accepted by the officers of the company? A. Yes. B. Have you paid the agent taking this application any part of the premium on the same; and, if so, how much, or what proportion? B. $5.

Write the names in full. Husband may sign for wife and his own name as follows: "Jane Doe, by John Doe."

When a creditor assures the life of a debtor, both must sign.

Dated this 17th day of April, 1879.

ERWIN G. COMSTOCK,
MUSKEGON NATIONAL BANK,
By WM. B. McLAUGHLIN, *Cash.*

PLAINTIFF'S EXHIBIT A.

Agent's Statement.

Have you seen the person herein proposed for assurance, and do you know the same to be the one described in the annexed medical examination? Yes.

Is there anything in form, figure, manners, customs, or appeaaance which indicates ill health, a feeble constitution, irregular habits, or intemperate living? No.

Have you carefully read over the applicant's, physician's, and examiner's statements, noting whether the age and date of birth agree, or whether there are errors in any of the answers, and have you found them correct, and do you believe them true? Yes.

Do you recommend the acceptance of the risk? ——.

At what agency will renewals be paid? Muskegon, Michigan.

Dated April 23, 1879.

WM. B. McLAUGHLIN, *Agent.*
F. C. PERCIVAL, *State Agent.*

If the applicant is a married woman ask—Is her husband insured, ——; is he insurable, ——; has he ever applied and been declined, ——.

Approved:

GLUECK, *Office Medical Examiner.*

130 PLAINTIFF'S EXHIBIT B.

Questions to be Answered Explicitly by the Medical Examiner of the Company.

N. B.—It is expected that the medical examiner will put such other questions bearing upon the case as he may think proper, and that the whole examination will be thorough, exact, and circumstantial. That he will feel the responsibility of his position, bearing in mind that in deciding whether to accept or decline a risk, the company place great reliance upon his statements:

1. Name and residence of person examined—Erwin G. Comstock.
2. Are you acquainted with the same? Yes.
3. State the approximate weight, height, and the figure of the applicant—Weight, 155 ; height, 5 ft. 6 in. ; figure, medium.
4. Does his general appearance indicate vigorous health, medium health, or want of vigor? Very good health.
5. State the measure around the nipples, under the vest, with the lungs empty, A., with lungs full, B., and the form of the chest, C—A., 32 inches ; B., 34½ inches; C., normal.
6. Does auscultation or percussion of the chest indicate disease of the heart or respiratory organs? No.
7. A. Is the respiratory murmur clear and distinct in every part of both lungs? A. Yes.
   B. Is the character of the respiration full, easy, and regular? B. Yes.
   C. Are there any indications of disease of the organs of respiration? C. No.
8. A. State the rate and other qualities of the person's pulse. A. 76, soft & full.
   B. Does it intermit, become irregular or unsteady at this examination? B. No.
9. A. Is the character of the heart's action uniform, free, and steady? A. Yes.
   B. Are its sounds and rhythm regular and normal? B. Yes.
   C. Are there any indications of disease of this organ or of the blood vessels? C. No.
10. Is the person subject to cough, expectoration, difficulty of breathing, or palpitation? No.
11. Are the functions of the brain, the muscular and nervous systems in a healthy state? Yes.
12. A. Are the abdominal organs in a healthy condition? A. Yes.
    B. Are the functions of the kidneys, bladder, and other urinary organs in a healthy state, and free from any tendency to disease? B. Yes.
    (Please apply the tests if there is any reason to suspect disease of the kidneys.) Urine examined; healthy.
13. Has the person any predisposition, either hereditary or acquired, to any local or constitutional disease? No.
14. A. Does the party habitually use ardent spirits, wine, or malt liquors? A. No.

B. If so, to what extent? B. Very seldom.
C. Are there any indications to lead you to suppose that the applicant has led or leads other than a sober and temperate life? C. No.

15. Have the person's parents, brothers, or sisters been afflicted with pulmonary or other diseases hereditary in their nature? Not that I can ascertain.
16. A. Has the person ever had any severe injury or illness? A. No.
B. If so, has it had any effect upon his constitution? B. —.
17. Is the application all filled out, and have you carefully read the same? Does it reveal any fact which you deem of special importance to comment upon, and what is it? Yes.
18. Signature of party examined, written in presence of the medical examiner—E. G. Comstock.
19. Do you consider the life safely assurable, and do you recommend that a policy be granted? Yes.
(Answer, I do, or I do not.)

(Signed) GEO. B. FOWLER,*
Medical Examiner

*Medical officer, Provident Savings Life.

Dated April 21, 1879.

Where graduated, Col. Phys. & Surg., N. Y. When graduated, 1871.

☞ If the person is a female, ascertain and state whether she has had children, how many, when last pregnant, whether she has had any miscarriages, and are her menses now regular? ——.

Additional remarks:——.

Questions, each of which is to be Answered by the Physician of the Person Applying for Assurance.

The physician is requested and expected to give any additional information upon the application, which he may possess, even though it be not embraced in the answers to the annexed questions.

1. Name of the person whose life is to be assured. ——.
2. A. How long have you known him? A. ——.
B. Have you been in the habit of seeing him frequently? B. ——.
C. Have you given him medical advice? C. ——.
D. For what disease? D. ——.
E. At what time? E. ——.
3. A. Have you any knowledge of the person's parents, brothers, and sisters? A. ——.
B. Have they been afflicted with any pulmonary complaints, or any other hereditary diseases? B. ——.

4. Has he at any time been afflicted with insanity, rheumatism, gout, dropsy, bilious colic, palsy, symptoms of disease of the heart, aneurism, rupture, spitting of blood, asthma, chronic cough, affections of the lungs, or other viscera, or with any organic disease? ——.
5. Has he any organic disease in any part of the body, or is any suspected? ——.
6. Has he, in your opinion, a hereditary disposition to any disease, and if so, what is it? ——.
7. No you believe he is now in good health? ——.
8. A. Is he sober and temperate? A. ——.
   B. Has he always been so? B. ——.
9. Is he accustomed to much exercise, or is he sedentary? ——.
10. Is his constitution healthy, and are his habits and circumstances such as to render his life safely assurable? ——.

(Signed) ————————.

Dated, ———, 18–.

The Northwestern Mutual Life Insurance Company, Milwaukee.

Life proposed, Erwin G. Comstock; occupation, broker; age, 37; residence, New York city; am't of policy, $20,000; premium, $567; kind of policy, life; how payable, annually. Agent, Wm. B. McLaughlin.

Agents will please fill these blanks.

Friend's Statement.

I have been personally acquainted with E. G. Comstock, of New York city, during the last ten years, and do believe that his habits of living are temperate, and that he is now in good health, and does ordinarily enjoy good health, and I know of no constitutional infirmity, or other circumstance affecting him calculated to make an assurance on his life more than usually hazardous excepting* nothing.

Dated at Muskegon, Mich., this first day of May, 1879.

(Signed) L. G. MASON.

*Add "nothing" if that is true, or whatever is the matter.

131 PLAINTIFF'S EXHIBIT C.

Home Office, Milwaukie, Wisconsin.

Premium for one year - $567 00

Premium as above received, this 17 day of April, 1880.

WM. B. McLAUGHLIN,
Agent.

Northwestern Mutual Life Insurance Company.

Policy No. 99256, insuring the life of E. G. Comstock, is hereby made binding for one year from the 17th day of April, 1880, provided payment, as per margin, is made in due time, and the receipt is countersigned by Wm. B. McLaughlin, ag't, Muskegon, Mich.

WILLARD MERRILL,
Secretary.

For terms of mutual agreement, see policy.

132 PLAINTIFF'S EXHIBIT D.

Home Office, Milwaukie, Wisconsin.

Northwestern Mutual Life Insurance Company.

Premium for one year	$567 00
Div.	157 40
	409 60

Policy No. 99256, insuring the life of E. G. Comstock, is hereby made binding for one year from the 17th day of April, 1881, provided payment, as per margin, is made in due time, and the receipt is countersigned by Wm. B. McLaughlin, ag't, Muskegon, Mich.

Premium as above received, this 16 day of April, 1881.

WM. B. McLAUGLIN, *Agent.*

WILLARD MERRILL, *Secretary.*

For terms of mutual agreement, see policy.

133 In the Circuit Court of the United States for the Southern District of New York.

THE MUSKEGON NATIONAL BANK, Plaintiff,

against

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant.

A case and bill of exceptions having been heretofore duly made, settled, signed, and filed in the above-entitled action, and the motion of said defendant for a new trial upon the exceptions contained therein, and upon the ground that the verdict is contrary to the weight of evidence having been heard and considered by the
134 court, it is ordered that said motion be, and the same is hereby, denied.

And said defendant having duly excepted to said last-mentioned ruling and order, it is further ordered that said case and bill of exceptions be, and the same is hereby, turned into the bill of exceptions in said action.

Dated February 13th, 1884.

N. SHIPMAN, *Judge.*

It is hereby consented that the within order may be made and entered herein.

N. York, February 12th, 1884.

JOHN P. ADAMS, *Att'y for Plaintiff.*

SALOMON & DULON, *Def't's Att'ys.*

Endorsed: In the circuit court of the United States for the southern district of New York. The Muskegon National Bank ag'st The Northwestern Mutual Life Insurance Company. Order denying motion for new trial, &c. U. S. circuit court. Filed Feb'y 14th, 1884. Timothy Griffith, clerk.

135 Supreme Court of the United States, of October Term, 1884.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,

vs.

THE MUSKEGON NATIONAL BANK, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this June term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Northwestern Mutual Life Insurance Company, by Edward Salomon, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

First. That the judge of said circuit court erred in sustaining at the trial of said action the objection to, and excluding the following question and answer contained in the deposition of John Torrent, to wit:

Q. Up to the time your acquaintance with him ceased, what would you say as to whether his drinking had affected his health or impaired his vital powers in any respect?

A. I think it had effected him very materially. I think
136 it had affected his nerves, and impaired his health generally—general debility; the symptons of that were his general looks, and that the time he went away, or just before he was taken very sick, and they didn't know whether he was going to be alive or die; that was the general impression.

Second. That said judge erred in excluding at said trial the following sentence contained in said deposition, to wit: "I think he had the delirium tremens."

Third. That said judge erred in excluding at said trial the following portion of the deposition of Nathaniel A. Barney, to wit:

Q. You had no understanding of that matter then, that he was trying to keep off delirium?

A. I would say the matter was talked of between the doctor and myself about his condition, and when I went for him, and took him up to the room, I asked him if I had better telegraph for his mother and father, and Marvin said we better consult with him and see what he thinks.

Q. Weren't you afraid he was going to have delerium?

A. I was afraid he might.

Q. Don't you know that the doctor was apprehensive of it?

A. Well, I asked the doctor and he thought there was no immediate danger. He though he could check it so there would be no immediate danger.

137 Fourth. That said judge erred in refusing at said trial, at the request of the counsel of said The Northwestern Mutual Life Insurance Company, to instruct the jury as follows, to wit:

To be habitually intemperate it is not necessary that a person

should be addicted to the excessive use of intoxicating liquors continually or without interruption, but a person who, during a period of time sufficient to form a habit in that respect, is addicted to periodical "sprees" of longer or shorter duration, when for days in succession he drinks intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness compels a cessation and terminate the "spree," comes within the definition of being habitually intemperate, although such person may remain sober for a month, three or six months, or even a year at a time.

Fifth. That said judge erred in refusing at said trial, at the request of said counsel of said company, to instruct the jury as follows, to wit:

If the jury find from the evidence that for seven or eight years immediately prior to the 17th day of April, 1879, Erwin G. Comstock was addicted to periodical "sprees," when for several days and sometimes for a week or more in succession he would drink intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness intervened, then they must find for the defendant, although they may find that he would remain sober for a month, three or six months, or even a year at a time.

138 Sixth. That said judge erred in refusing at said trial, at the request of said counsel of said company, to instruct the jury as follows, to wit:

It was the duty of the plaintiff and of Erwin G. Comstock, in their application for this policy of insurance, to communicate to the defendant the fact that for six or seven years immediately prior to the first day of June, 1878, Comstock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, although he might remain sober for a month, three or six months, or longer even at a time, and their failure to disclose such facts to the defendant avoids the policy, and the jury must find for the defendant.

Seventh. That said judge erred in refusing at said trial, at the request of said counsel of said company, to instruct the jury as follows, to wit:

If the jury should find from the evidence that for six or seven years immediately prior to the first day of June, 1878, Erwin G. Comstock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, until sickness and prostration would intervene and terminate the spree; that such sprees would occur once in every three or six months, or thereabouts; that on the first day of June, 1878,
139 after termination of one of such sprees, under threat of dissolution of partnership from his then partner, Mr. Hoagland, he gave a written pledge not to drink any more so long as he and

Hoagland were associated in business; that his partnership with Hoagland ceased on the first day of May, 1879; that afterwards, during the years 1880 and 1881, he again became addicted to such periodical sprees; that during the year 1880 he had at least three such sprees; that during the year 1881, up to the latter part of April of that year, he had a number of such sprees of great intensity; that in one of those sprees, in or about the month of April, 1881, he subjected himself to the restraint of a nurse for several weeks in order to prevent himself from obtaining liquor; then the jury must find for the defendant.

Eighth. That said judge erred in refusing at said trial, at the request of said counsel of said company, to instruct the jury as follows, to wit:

If the jury find from the evidence that after the making of the policy of insurance during the years 1880 and 1881, Erwin G. Comstock became addicted to periodical sprees lasting for a number of days or even a week or more each time, when he would use intoxicating liquors to such excess as to produce continued drunkenness, and prostrate him and make him sick for several days; that such sprees occurred in or about the month of March, 1880, in or about the month of July, 1880, again in or about the month of August, 1880, again on or about the first of January, 1881, again in or about the month of February, 1881, and again in or about the
140 month of April, 1881; that his last sprees in February and April, 1881, were of such intensity that towards the close of the drinking period, when sick and prostrated, he subjected himself to nurses for a week and more each time, in order that they might assist him to become sober; then they must find for the defendant.

Ninth. That said judge erred in refusing to grant a new trial in said action.

And the said The Northwestern Mutual Life Insurance Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it has lost by occasion of the said judgment.

EDWARD SALOMON,
Attorney for Plaintiff in Error.

(Endorsed:) Supreme Court of the United States. The Northwestern Mutual Life Insurance Company, plaintiff in error, *vs.* The Muskegon National National Bank, defendant in error. Assignment of errors. Edward Salomon, attorney for plaintiff in error, 115 Broadway, New York city. U. S. circuit court. Filed Mar. 21, 1884. Timothy Griffith, clerk.

141 Supreme Court of the United States.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
THE MUSKEGON NATIONAL BANK, Defendant in Error. } In Error.

And afterwards, to wit, on the second Monday of October, in Oc-

tober term, in the year of our Lord one thousand eight hundred and eighty-four, the said The Muskegon National Bank, by John P. Adams, its attorney, freely comes here into court and says that there is no error either in the record and proceedings aforesaid, or in the giving of the judgment aforesaid, and it prays that the said
142 Supreme Court of judicature, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error; and that the judgment aforesaid, in form as aforesaid given, may be in all things affirmed, etc.

JOHN P. ADAMS,
Attorney for Defendant in Error.

(Endorsed:) Supreme Court of the United States. The Northwestern Mutual Life Insurance Company, plaintiff in error, against The Muskegon National Bank, defendant in error. Joinder in error. John P. Adams, attorney for defendant in error, 194 Broadway, New York city. U. S. circuit court. Filed Ap'l 9th, 1884. Timothy Griffith, clerk.

143 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the 2nd Circuit.

THE MUSKEGON NATIONAL BANK, Plaintiff,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendant.

Know all men by these presents, that we, Isaac H. Bailey, of the city of New York, in the State of New York, and George J. McGourkey, of the same place, are held and firmly bound unto the aboved named The Muskegon National Bank in the sum of fifty thousand dollars, to be paid to the said The Muskegon National Bank, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the seventeenth day of March, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas the above-named The Northwestern Mutual Life Insurance Company has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the
144 above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named The Northwestern Mutual Life Insurance Company shall prosecute its said writ of error to effect and answer all damages and costs, including just damages for delay and costs and interest on the appeal, if it fail to make its plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

ISAAC H. BAILEY. [L. S.]
GEO. McGOURKEY. [L. S.]

Sealed and delivered and taken and acknowledged, this 17th day of March, 1884, before me.

[SEAL.] CHAS. RENDALL,
Notary Public (134) *N. Y. Co.*

STATE, CITY, AND COUNTY OF NEW YORK,
UNITED STATES OF AMERICA,
Southern District of New York, } *ss:*

Isaac H. Bailey and George J. McGourkey, being severally duly sworn, do depose and say, each for himself, that he is worth the sum of fifty thousand dollars over and above all his just debts and liabilities.

ISAAC H. BAILEY.
GEO. McGOURKEY.

Sworn to before me, the 17th day of March, 1884.

CHAS. RENDALL,
Notary Public (134) *N. Y. Co.*

145 STATE OF NEW YORK,
City and County of New York, } *ss:*

I, Patrick Keenan, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that Charles Rendall, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 17th day of March, 1884.

[SEAL.] PATRICK KEENAN, *Clerk.*

(Endorsed:) U. S. circuit court. The Muskegon National Bank *vs.* The Northwestern Life Insurance Company. Bond for damages and costs on writ of error. Approved this 18th day of March, 1884. Wm. J. Wallace, circuit judge. U. S. circuit court. Filed Mar. 21, 1884. Timothy Griffith, clerk.

146 United States Circuit Court for the Southern District of New York.

THE MUSKEGON NATIONAL BANK, Pl'ff,
vs.
THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Defendant.

STATE OF NEW YORK,
City and County of New York, Southern District of New York, } *ss:*

George J. McGourkey, being duly sworn, says: That he is a resi-

dent of the city of New York, and one of the sureties on the bond executed on behalf of and for the Northwestern Mutual Life Insurance Company to the Muskegon National Bank, in the penalty of fifty thousand dollars, to obtain a supersedeas on the writ of error to the Supreme Court of the United States to review the judgment rendered in the above-entitled action; that he is the owner of four lots on One Hundred and Thirty-seventh street, in the city of New York, unincumbered, and of the value of about six thousand dollars; also of another lot on Sixty-fifth street, between Eighth and Ninth avenues, in said city, unincumbered, and of the value of about nine thousand dollars; that he is the owner of first mortgage rail-
147 road bonds of various railroads, of the class known as investment bonds, of more than one hundred thousand dollars in amount and value, all of which and more personal property he owns over and above all debts and liabilities, which do not exceed one hundred dollars.

GEO. McGOURKEY.

Subscribed and sworn to before me, this 18th day of March, 1884.
[SEAL.] JAMES S. ALLEN, (36),
Notary Public, N. Y. Co.

STATE OF NEW YORK, }
City and County of New York, Southern District of New York, } *ss:*

Isaac H. Bailey, being duly sworn, says that he is the other surety on the bond mentioned in the foregoing affidavit of George J. McGourkey; that he is a resident of the city of New York; that he is the owner of a house and lot known as 124 East 28th street, in the city of New York, unincumbered and of the value of about fifteen thousand dollars; also, of a lot on One Hundred and Thirtieth street, in said city, unincumbered and valued at about four thousand dollars; that he is the owner of railroad, bank, insurance, and tannery stock of the value of more than one hundred thousand dollars and over and above, and free and clear from all in-
148 cumbrances, debts, and liabilities, and that all his debts and liabilities are fully secured by other property than that above enumerated.

ISAAC H. BAILEY.

Subscribed and sworn to before me, this 18th day of March, 1884.
SEAL.] JAMES S. ALLEN, (36),
Notary Public, N. Y. Co.

(Endorsed:) Clerk will file enclosed. W. J. W. U. S. circuit court. Filed Mar. 24, 1884. Timothy Griffith, clerk.

149 UNITED STATES OF AMERICA, *ss:*

To the Muskegon National Bank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on

the second Monday of October, eighteen hundred and eighty-four, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Northwestern Mutual Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated March 21st, 1884.

WM. J. WALLACE,
Circuit Judge.

150 [Endorsed:] U. S. Supreme Court. The Northwestern Mutual Life Insurance Company, plaintiff in error, against The Muskegon National Bank, defendant in error. Citation. Edward Salomon, attorney for the plaintiff in error, 115 Broadway, N. Y. City, N. Y. I admit due service of the within citation. Dated N. Y., March 21, 1884. John P. Adams, att'y for def't in error. U. S. circuit court. Filed Mar. 21, 1884. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 917. The Northwestern Mutual Life Insurance Company, plaintiff in error, *vs.* The Muskegon National Bank. Filed 8th September, 1884.

122-501

Supreme Court of the United States.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

THE MUSKEGON NATIONAL BANK,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD SALOMON,

Attorney for Plaintiff in Error,

115 BROADWAY,

New York City.

BURGOYNE'S "QUICK PRINT," 146-150 CENTRE ST., N. Y.

the second Monday of October, eighteen hundred and eighty-four, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The Northwestern Mutual Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated March 21st, 1884.

WM. J. WALLACE,
Circuit Judge.

150 [Endorsed:] U. S. Supreme Court. The Northwestern Mutual Life Insurance Company, plaintiff in error, against The Muskegon National Bank, defendant in error. Citation. Edward Salomon, attorney for the plaintiff in error, 115 Broadway, N. Y. City, N. Y. I admit due service of the within citation. Dated N. Y., March 21, 1884. John P. Adams, att'y for def't in error. U. S. circuit court. Filed Mar. 21, 1884. Timothy Griffith, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 917. The Northwestern Mutual Life Insurance Company, plaintiff in error, *vs.* The Muskegon National Bank. Filed 8th September, 1884.

122-501

Supreme Court of the United States.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

vs.

THE MUSKEGON NATIONAL BANK,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD SALOMON,

Attorney for Plaintiff in Error,

115 BROADWAY,

New York City.

BURGOYNE'S "QUICK PRINT," 146-150 CENTRE ST., N. Y.

Supreme Court of the United States.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,

vs.

THE MUSKEGON NATIONAL BANK,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The action in the Court below, the Circuit Court of the United States for the Southern District of New York, was brought by the defendant in error, the Muskegon National Bank, against the plaintiff in error, the Northwestern Mutual Life Insurance Company, upon a policy of insurance issued by the latter upon the life of Irwin G. Comstock in favor of the bank as creditor of Comstock for the amount of $20,000, dated April 17, 1879. The policy contained amongst others the clause that it should be null and void if said Comstock "shall "become either habitually intemperate or so far intem- "perate as to impair health or induce delirium tremens, "* * * or if any of the statements or declarations "in the application for this policy and upon the faith

" of which it is issued, shall be found in any material " respect untrue." (Record, pp. 69 and 70).

The application for the policy, dated the same day and signed by Comstock and the cashier of the bank, contained amongst others the following question and answer: " Are you or have you ever been in the habit of using alcoholic beverages or other stimulants? A. Yes, occasionally." And also the following clause below the questions and answers: " It is hereby declared " that the above are the applicant's own fair and true " answers to the foregoing questions, and that the ap- " plicant is not and will not become habitually intem- " perate or addicted to the use of opium; and " it is hereby agreed by the undersigned " that these statements with this declaration shall form " the basis of the contract with the Northwestern " Mutual Life Insurance Company for assurance, and " that any untrue or fraudulent answers, any suppres- " sion of facts in regard to the applicant's health, hab- " its, or circumstances material to the risk * * * " shall vitiate the policy and forfeit all payments made " thereon." (Record, p. 74.)

Comstock died June 29, 1881. The insurance company defended the action principally on two grounds:

1*st*, that at the time of the application Comstock was and prior thereto had been habitually intemperate and that he had fraudulently suppressed the fact of such intemperance.

2*d*, that, after the issuing of the policy, he became habitually intemperate, or so far intemperate, as to impair health or induce delirium tremens. (Record, p. 60.)

The action was tried before Hon. NATHANIEL SHIPMAN, Judge, and a jury at the City of New York in October, 1883. It appeared at the trial that Comstock was cashier of the bank at Muskegon from 1870 until

July, 1875, and left there in September, 1875, to reside in New York, where he lived until his death. The testimony of certain witnesses whose depositions were taken on behalf of the bank at Muskegon tended to prove that from 1870 until 1875, Comstock was subject to periodical sprees or debauches of intemperance, occurring at intervals of from one to three or four months, lasting from two to ten days each, often for days unfitting him for business, and resulting in severe sickness and prostration, increasing in frequency during the last years of his residence in Muskegon, and ending, in September, 1875, with a sickness bordering upon delirium. (Record, p. 62.)

Upon the reading of these depositions, certain questions and answers were excluded by the trial Judge which referred to Comstock's condition and appearance, to which rulings exceptions were taken, and which appear more fully in the specification of errors hereinafter.

A good deal of testimony was also introduced by the Insurance Company, tending to prove that after his removal to New York, during the years 1876 and 1877, and up to June, 1878, Comstock was addicted to these periodical sprees, when on June 1st, 1878, he wrote out a pledge to his then partner in business, Hoagland, under threat of dissolution of partnership to drink no more so long as they were associated in business; that commencing with March, 1880, down to the time of his death, he had many prolonged and severe attacks of intemperance, lasting for days and weeks at a time, prostrating him and recurring at an interval of about two months, and that he died in one of these drunken fits. (Record, pp. 62 and 63.)

After the Judge's charge, the counsel for the bank asked for certain specific instructions to the jury concerning the definition or character of habitual intemperance and its application to the specific facts claimed to have been proven by the testimony in the case and

upon which it was claimed that the jury must find for the defendant, which instructions were refused and exceptions taken to such refusal. They also appear more fully in the following specification of errors:

Errors Relied Upon.

First. The Court below erred in excluding at the trial of said action the following question and answer contained in the deposition of John Torrent, to wit:

"Q. Up to the time your acquaintance with him (Comstock) ceased, what would you say as to whether his drinking had affected his health or impaired his vital powers in any respect?

"A. I think it had affected him very materially. I think it had affected his nerves and impaired his health generally—general debility; the symptoms of that were his general looks, and that the time he went away, or just before, he was taken very sick, and they didn't know whether he was going to be alive or die; that was the general impression." (Record, pp. 14 and 15.)

Second. Said Court erred in excluding at said trial the following sentence contained in said deposition, to wit: "I think he had the delirium tremens." (Record, p. 15.)

Third. Said Court erred in excluding at said trial the following portion of the deposition of Nathaniel A. Barney, to wit:

"Q. You had no understanding of that matter then, that he was trying to keep off delirium?

A. I would say the matter was talked of between the doctor and myself about his condition, and when I went for him, and took him up to the room, I asked him if I had better telegraph for his mother and father, and

Marvin said we better consult with him and see what he thinks.

Q. Weren't you afraid he was going to have delirium?

A. I was afraid he might.

Q. Don't you know that the doctor was apprehensive of it?

A. Well, I asked the doctor and he thought there was no immediate danger. He thought he could check it, so there would be no immediate danger." (Record, pp. 19 and 20.)

Fourth. The said Court erred in refusing at said trial, at the request of the counsel of said Northwestern Mutual Life Insurance Company, to instruct the jury as follows, to wit:

"To be habitually intemperate it is not necessary that a person should be addicted to the excessive use of intoxicating liquors continually or without interruption; but a person who, during a period of time sufficient to form a habit in that respect is addicted to periodical "sprees" of longer or shorter duration, when for days in succession he drinks intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness compel a cessation, and terminate the "spree," comes within the definition of being habitually intemperate, although such person may remain sober for a month, three or six months, or even a year at a time." (Record, pp. 65 and 66.)

Fifth. The said Court erred in refusing at said trial at the request of said counsel of said Company, to instruct the jury as follows, to wit:

"If the jury find from the evidence that for seven or eight years immediately prior to the 17th day of April, 1879, Erwin G. Comstock was addicted to periodical "sprees," when for several days and sometimes for a week or more in succession he would drink intoxicating

liquors to great excess, producing a state of continued drunkenness until prostration and sickness intervened, then they must find for the defendant, although they may find that he would remain sober for a month, three or six months, or even a year at a time." (Record, p. 66.)

Sixth. The said Court erred in refusing at said trial at the request of said counsel of said company, to instruct the jury as follows, to wit:

"It was the duty of the plaintiff and of Erwin G. Comstock in their application for this policy of insurance to communicate to the defendant the fact that for six or seven years immediately prior to the first day of June, 1878, Comstock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, although he might remain sober for a month, three or six months, or longer even, at a time; and their failure to disclose such facts to the defendant avoids the policy and the jury must find for the defendant" (Record, p. 66).

Seventh. The said Court erred in refusing at said trial, at the request of said counsel of said company, to instruct the jury as follows, to wit:

"If the jury should find from the evidence that for six or seven years immediately prior to the first day of June, 1878, Erwin G. Comstock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, until sickness and prostration would intervene and terminate the spree; that such sprees would occur once in every three or six months or thereabouts; that on the first day of June, 1878, after termination of one of such sprees, under threat of dissolution of partner-

ship from his then partner, Mr. Hoagland, he gave a written pledge not to drink any more so long as he and Hoagland were associated in business; that his partnership with Hoagland ceased on the first day of May, 1879; that afterwards, during the years 1880 and 1881, he again became addicted to such periodical sprees; that during the year 1880 he had at least three such sprees; that during the year 1881, up to the latter part of April of that year, he had a number of such sprees of great intensity; that in one of those sprees, in or about the month of April, 1881, he subjected himself to the restraint of a nurse for several weeks in order to prevent himself from obtaining liquor; then the jury must find for the defendant" (Record, pp. 66 and 67).

Eighth. The Court erred in refusing at the said trial, at request of said company, to instruct the jury as follows, to wit:

"If the jury find from the evidence that after the making of the policy of insurance during the years 1880 and 1881, Erwin G. Comstock became addicted to periodical sprees lasting for a number of days, or even a week or more each time, when he would use intoxicating liquors to such ~~extent and~~ excess as to produce continued drunkenness, and prostrate him and make him sick for several days; that such sprees occurred in or about the month of March, 1880, in or about the month of July, 1880, again in or about the month of August, 1880, again on or about the first of January, 1881; again in or about the month of February, 1881, and again in or about the month of April, 1881; that his last sprees in February and April, 1881, were of such intensity that towards the close of the drinking period, when sick and prostrated, he subjected himself to nurses for a week and more each time, in order that they might assist him to become sober, then they must find for the defendant." (Record, p. 67.)

ARGUMENT.

Point I.

First. *The first two alleged errors refer to the exclusion of certain testimony of the witness, Torrent.*

He testified that he knew Comstock at Muskegon from 1868 to 1875; that he did a good deal of business through the bank he was cashier in, keeping his account there; that he knew Comstock was addicted to the use of intoxicating liquors during the period of their acquaintance; that he had seen him drink, drank with him, seen him drunk and known of his being on prolonged sprees; that he had seen him fall down in the street while drunk and had seen him act out the drunkard pretty thoroughly in different ways; that when he had not been drinking he was pretty smart, active, talkative and of good business qualifications generally; that he was an energetic and appeared to be a healthy man; that his sprees were pretty frequent; that sometimes he would get started and go it once or twice a week, then he might let up for a week and the next week he might get worse and be drunk nearly all the time; that he would be drunk one quarter of the time, staggering drunk, there at Muskegon during the last two or three years. (Record, p. 14.)

Then the question was asked:

"Up to the time your aquaintaince with him ceased (1875) what would you say as to whether his drinking had affected his health or impaired his vital powers in any respect?" To which the witness answered: "I think it had affected him very materially, I think it had affected his nerves and impaired his health generally, generaly debility; the symptoms of that were his general looks and that the time he went away, or just before,he was taken very sick and they didn't know whether

he was going to be alive or die, that was the general impression." (Record, pp. 14 and 15.)

The exclusion of this question and answer is the first error assigned.

The witness further testified that he saw him during that sickness referred to in the excluded answer which was just before he left for New York; that he was then sick for about three weeks, adding "I think he had the delirium tremens." This last sentence the Court excluded, which constitutes the second error assigned.

The exclusion of this testimony was error. Although not a medical expert, the witness was competent to testify on the subject as he did, because he was merely testifying to facts apparent to any man of intelligence and being the result of his own personal observations. It was not the testimony of an expert, but that of an intelligent man of what he saw; and, so far as the answers were expressive of an impression or opinion they were preceded by a statement of the facts and circumstances within his personal knowledge upon which the opinion was founded.

Ins. Co. vs. Rodel, 95 U. S., 232.
Conn. Mut. Life Ins. Co. vs. Lathrop, 111 U. S., 612.

The rejected testimony was material because the question was upon the frequency, extent and severity of Comstock's drunken fits and sprees and upon the question whether in his subsequent application for insurance he and the bank were chargeable with "suppression of facts in regard to the applicant's health, habits or circumstances, material to the risk," when he answered the question: "Are you or have you ever been in the habit of using alcoholic beverages or other stimulants? by "yes, occasionally;" omitting and concealing all reference to his drunken sprees and fits of sickness by which his health was impaired and the border line of insanity approached, as testified to

by this witness. That this excluded testimony, was material is best shown by the Judge's charge to the jury on the subject of the alleged suppression o. material facts (Record, pp. 60 and 61).

Second. *The third alleged error refers to the exclusion of certain testimony of the witness Nathaniel A. Barney.*

The foregoing remarks are also applicable here. The testimony of this witness was taken on behalf of the bank, whose counsel declining to read it, it was read by the company's counsel. The witness was hotel-keeper at Muskegon with whom Comstock boarded periodically from 1868 to 1875, and to whose house he often went to hide himself and to be taken care of during his drunken and sick spells. The witness himself took care of him on such occasions. At the time of his last sickness from a spree at Muskegon, the witness took care of him and sent for his parents to take him home. The witness was called by the bank, was evidently friendly to it, to Comstock and his memory, and reluctantly on cross-examination disclosed the damaging facts of Comstock's habits. The testimony excluded by the Court showed that he as well as the attending physician feared the approach of delirium tremens and therefore sent for Comstock's parents. It was competent and material testimony and therefore error to exclude it.

Point II.

The fourth error assigned is the refusal of the Court to give the following instruction to the jury:

"To be habitually intemperate it is not necessary

that a person should be addicted to the excessive use of intoxicating liquors continually or without interruption; but a person who, during a period of time sufficient to form a habit in that respect is addicted to periodical "sprees" of longer or shorter duration, when for days in succession he drinks intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness compel a cessation, and terminate the "spree," comes within the definition of being habitually intemperate, although such person may remain sober for a month, three or six months, or even a year at a time." (Record, pp. 65 and 66.)

I submit that this definition of habitual intemperance as applied to the facts in this case is correct.

A person who has been addicted for a number of years to such periodical debauches and fits of intemperance cannot certainly be called a man of temperate habits; his habits have become intemperate; and if then he makes an attempt to break these intemperate habits and succeeds in doing so for a period of three or six or twelve months even; still he cannot be said to have become a man of temperate habits. *If it takes years to create the habit, it must take years of constant sobriety to free the victim from it.* If, as the witnesses testified, Comstock had for six or seven years been addicted to such periodical debauches recurring every two or three or four months up to the time of his leaving Muskegon, increasing in violence and frequency during the last two or three years, and ending with sickness and utter prostration on the confines of delirium tremens, as described by the witnesses, it cannot certainly be said that even a year of enforced sobriety had freed him from the habit. And if, as further appeared by the testimony in this case, and as I shall more fully refer to hereafter, after his removal to New York Comstock had occasional fits of intemperance during 1876, 1877, and up to June, 1878, when upon the termination of a severe debauch, under threat

of dissolution of partnership, he pledged himself not to drink any more so long as they should remain associated in business, and then, upon the cessation of that partnership, he relapsed, and from March, 1880, down to the time of his death, in June, 1881, his debauches were renewed, and recurred with increasing violence at intervals of about two months, ending with utter prostration each time, and towards the end with an inability to control his appetite without the aid of others, death ensuing finally in his last debauch; the above-mentioned instruction cannot be considered as an incorrect proposition of law; nor is it without direct authority.

In the case of *Union Mut. Life Ins. Co. vs. Reif*, 36 Ohio, p. 596, where the question was whether the insured had been a man of temperate habits, and the jury in the Court below had returned a verdict for the plaintiff under the charge of the Judge, which might have misled them to think that it was necessary for the defendant to show that the insured was in a daily or continuous state of intoxication, while the proof was that he indulged to excess at frequent times, with sober intervals of longer or shorter duration, the Supreme Court of Ohio, reversing the judgment below, say (p. 600): "Where the general habits of a man are very abstemious or temperate, an occasional indulgence to excess does not make him a man of intemperate habits. *But if the habit is formed of drinking to excess, and an appetite for liquor is indulged to intoxication, either constantly or periodically, no one will claim that his habits are temperate,* though he may be duly sober for longer or shorter periods in the interval between the times of debauches. * * * Indeed, high medical authority is not wanting to show that periodical drunkenness, the result of uncontrollable appetite, is generally much more excessive, and therefore more dangerous than daily habitual intoxication.

In the case of *Mutual Benefit Life Insurance Co. vs. Holterhoff*, 2 Cin. Supr. Court Rep., p. 379, a case very

much like the present, the General Term of that Court reversing the judgment below, because the verdict was against the evidence, used the following language, exactly descriptive of Comstock's habits as proven by the witnesses on behalf of the company in the case at bar (p. 382): "A third class acquire a constitutionally nervous appetite for alcoholic liquors. It really amounts to a disease. A case is easily recognized by all who are well acquainted with the person. Such persons may remain sober for a month, three or six months, or even a year at a time, and refuse to taste any intoxicating drinks (they must refuse if they would not get drunk), and then go upon what is called 'a spree' of great intensity, and lasting for a longer or shorter period, usually until prostration and sickness, and often delirium compel a cessation and terminate the 'spree.'"

This instruction was asked with reference to the point that the renewal of his debauches commencing in March, 1880, and continuing down to his death, must be considered in connection with his former intemperate habits, notwithstanding the period of enforced sobriety during his partnership with Hoagland.

In this respect, the instruction went farther than the Judge's charge on that subject which, while correct enough in itself, absolutely separated the two periods before and after the application and ignored the actual connection between them. (Record, p. 62.)

It certainly cannot be claimed that the period of enforced sobriety from June, 1878, until March, 1880, had absolutely cured Comstock of his disease and former habits, and that the jury, in judging of the character of his subsequent debauches from March, 1880, should disregard entirely his previous habits of intemperance of so many year's standing. To supply this defect in the Judge's charge, this instruction was asked and it should have been given.

Point III.

The fifth error assigned is for the refusal to give the following instruction to the jury:

"If the jury find from the evidence that for seven or eight years immediately prior to the 17th day of April, 1879, Erwin G. Comstock was addicted to periodical sprees, when for several days and sometimes for a week or more in succession he would drink intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness intervened, then they must find for the defendant, although they may find that he would remain sober for a month, three or six months, or even a year at a time." (Record, p. 81.)

The argument in the preceding point is applicable here. If Comstock had become habitually intemperate by six or seven years of periodical debauches down to June 1st, 1878, as testified to by the witnesses for the Insurance Company, and, as will be more particularly referred to hereinafter, his enforced sobriety for nine months and a half under his pledge to Hoagland, should not be considered as setting him free from his previous intemperate habits, and, therefore, this instruction should have been given to the jury.

Point IV.

The sixth error assigned is for the refusal to give the following instructions to the jury, to wit:

"It was the duty of the plaintiff and of Erwin G. Comstock in their application for this policy of insurance to communicate to the defendant the fact that for six or seven years immediately prior to the first day of June,

1878, Comstock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, although he might remain sober for a month, three or six months, or longer even, at a time; and their failure to disclose such facts to the defendant avoids the policy and the jury must find for the defendant." (Record, p. 81.)

The learned Judge in his charge to the jury had in substance instructed therein, that, if Comstock was at the time of making the application the victim of an appetite which impelled him to frequent and prolonged sprees, his answer "I drink liquor occasionally," to the question whether he then was or ever had been in the habit of using alcaholic beverages would be a suppression of a fact material to the risk. (Record, p. 60.)

It is respectfully submitted that, while this was correct, it did not go far enough in view of the facts proven in the case and that this instruction should have been given.

For that purpose it will be necessary to examine more fully the testimony in the case of Comstock's habits up to June 1st, 1878, when he gave the pldege of sobriety to Hoagland.

Comstock's Habits in Muskegon from 1869 to September, 1875.

William B. McLaughlin, who was in the employ of the bank from November, 1870, until March, 1881, all the way up from collection clerk to cashier, testified that he saw Comstock frequently under the influence of liquor; that he generally stayed away from business when in that condition; that he would frequently go away from town without leaving word at the office where he was going, or that he was going at all, and be gone a week or ten days; that while away

he would make checks on the bank, the signature of which would show that he was on a spree ; that these sprees while in town would generally continue from three to six days, ending with a sick spell, perhaps confining him to his bed a day or two ; that witness could not say how often Comstock was in the habit of getting drunk while in the bank, but a good many times ; that he might keep straight for two or three months at a time, and again he might have two or three sprees in one month ; that he would get so drunk that he was unable to attend to business, which condition would last from two to ten days, probably, usually from three to five or six days (Record, pp. 10-14).

John Torrent, lumberman, fifty years of age, a stockholder of the bank, testified that he was acquainted with Comstock while the latter lived at Muskegon for six or seven years. That he had seen him drink, had drunk with him and had seen him drunk. That he had known of his being on prolonged sprees. That he had seen him fall down in the streets while drunk. That he had seen him act out the drunkard's part pretty thoroughly in different ways. That that habit prevailed with him more or less during the time that he lived there. That part of the time during those sprees he was not fit for business. That the sprees were pretty frequent. Sometimes he would get started and go it once or twice a week. Then he might let up for a week and the next week he might get worse and be drunk almost all the time. That he should think Comstock was drunk one quarter of the time. That just before he left for New York, he was sick for about three weeks from drinking liquor (Record, pp. 14, 15, 16).

Nathaniel A. Barney, keeper of the Occidental Hotel at Muskegon, fifty-six years of age, testified that he knew Comstock since 1868. That during the seven years that Comstock lived at Muskegon he boarded with him three-quarters of the time. That he saw him under the influence of liquor a few times, but never

saw him stagger or anything like that. That when he did drink and have sprees they would last him two or three days. That he sometimes was with him when he slept in Muskegon. That these times would be when he would be on these little "toots," when he would come there, and the witness would give him a room and take care of him, being with him nights when he was on these "toots." Some of the time he would be sick then, sometimes two or three days, and sometimes not so long. That the last time, just before he left, witness sent for his father and mother to Pontiac. That he had been on a "toot" at that time, and was quite sick for several days, confined to his room at the hotel perhaps a week or ten days. That he was rather inclined to keep out of the way when on a "toot." That these sprees were rather more frequent during the last years that he stayed in Muskegon. That they would occur along first once in three or four months or longer, sometimes he would go five or six months, and some of the time oftener. That witness helped take care of him five or six times in the course of the seven years when he was sick from drinking. That his last sickness was the severest, his other sicknesses from sprees, including the sprees, lasted usually from two to four days (Record, pp. 16-20).

Of the testimony of these witnesses, that of McLaughlin was sought to be weakened by the fact that he was the agent of the company through whose hands the application passed; but he testified that he recommended the risk on the strength of the information and belief that Comstock had quit drinking since he left Muskegon (Record, p. 13). Besides, he made the application for this insurance as cashier on the part of the bank, and there is nothing to warrant the rejection of his testimony, which is most emphatically sustained by that of John Torrent, a stockholder of the bank, and that of Nathaniel Barney, the landlord whose deposition was

originally taken by and in behalf of the plaintiff, but who, although reluctantly, had on his cross-examination, to bear most important testimony to Comstock's habits of extreme periodical intemperance.

The testimony of these three witnesses unquestionably results in the establishment of the fact that from 1870 until 1875, Comstock was subject to periodical sprees or debauches of intemperance, occurring at intervals of from one to three or four months, lasting from two to ten days each, often for days unfitting him for business, and resulting in severe sickness and prostration, increasing in frequency during the last years of his residence in Muskegon, and ending, in September, 1875, with a sickness bordering upon delirium.

To overcome this testimony the plaintiff brought forward four witnesses.

Edward B. Mather, a hardware merchant of Muskegon, testified that he didn't know Comstock particularly well during the period of his residence there, but saw him frequently; that he had heard some about his being in the habit of getting on sprees, but that he couldn't answer the question whether he ever saw him under the influence of liquor (Record, pp. 42, 43).

Sidney S. Morris, a packer and jobber of provisions, 37 years old, testified that he knew Comstock from August, 1871, to the time that he left Muskegon; that he did business with the plaintiff, his place of business being opposite the bank in its old quarters. That from 1872 he was in the bank daily; previously to that occasionally. That he met Comstock daily and some days several times, and was not aware that during that time he ever saw him under the influence of liquor. That he was sometimes out of town during that time. That by "daily" he meant "almost daily," and by "almost daily" he meant fre- "quently." That he did not see Comstock much outside of business hours, and his business in the bank

was occasionally transacted with Comstock. (Record, pp. 43, 44.)

Michael H. Brennan, 29 years of age, testified that he was janitor of the plaintiff from October, 1874, till Comstock left, in 1875. That Comstock had rooms in the bank building from shortly after the bank moved into its new building in December, 1874. That Comstock's habits during that time, in regard to the use of intoxicating liquors, were good, so far as witness observed. That he never but twice saw him under the influence of liquor. That witness' duties were to clean and heat the bank building. That Comstock's rooms in the new building were in the upper floor, while witness' rooms were in the basement, which he first occupied three or four weeks after the bank was moved down. That he first saw Comstock intoxicated in the spring of 1875, and the next time in June, 1875, both times in the evening. That Comstock's business occasionally called him to Chicago and other places; that he was absent from town more or less at some one of those places. That that occurred to some extent after the bank moved, and that witness' knowledge of Comstock's habits was confined principally to his observation after the bank moved. (Record, pp. 44, 45, 46.)

Lyman G. Mason testified that he was a director of the plaintiff, and had been such with the exception of three years from the organization of the bank; that Comstock left the bank in July, and Muskegon in September, 1875; that at that time he was under the influence of liquor, not to exceed two, three or four days, a short time. That prior to that time, and covering the whole period of witness' acquaintance with him from 1869, he had seen him slightly under the influence of liquor. He didn't know on how many occasions; not very frequently. That witness recollected two or three occasions prior to 1875. That he never saw him incapacitated for business. That the capital stock of the plaintiff was $200,000,

of which witness held 10 per cent. That he signed the "friend's statement" on the application, and had charge of this case from the Board of Directors. That this was the third time that he had been in New York in connection with this case. That he went around at one time with the plaintiff's attorney to see witnesses, and obtained affidavits from a number of them. That durthe time that Comstock lived in Muskegon witness very often saw him evenings, but very seldom under the influence of liquor while he was cashier of the bank, from two to six times a year—six times would be the maximum—very seldom during the daytime. That he remembered no such occasion as testified to by Mr. Barney when Comstock was confined to his room by reason of spree's or "toots." (Record, pp. 56-59.)

Of the testimony of these witnesses, that of Mather amounts to absolutely nothing, and that of Morris is merely negative. The latter saw Comstock frequently but only during business hours, and considering the well-established fact that Comstock kept away from business as much as possible when under the influence of liquor, the testimony does not contradict or even tend to contradict or modify that of the other witnesses.

The same observation may be made of Brennan's testimony. He knew Comstock only during the last six months that he was cashier of the bank; part of which time he was absent, or supposed by the witness to be absent from Muskegon. He was the plaintiff's janitor when his testimony was taken, and a warm friend of Comstock and even he had to admit that he saw him drunk twice. His testimony is not inconsistent with that of the defendant's witnesses.

Mason's testimony, on the other hand, considering his great pecuniary and other interests in the case, is corroborative rather than otherwise of that of the defendant's witnesses. He never saw him but once in the condition described by the other witnesses, because he was

not present; he never was present when Barney took care of him in his hotel, or when he was confined to his bed for days in consequence of debauches, or when Torrent saw him on prolonged sprees fall down in the streets and act out the drunkard's part, or when Torrent, McLaughlin or Barney saw him unfit for business. And even Mason admits that he saw him drunk from two to six times a year.

The testimony of all these witnesses is not contradictory or inconsistent, and leaves the facts as testified to by McLaughlin, Torrent and Barney concerning Comstock's habits during his residence in Muskegon unshaken and free from doubt.

Comstock's habits in New York from 1875 to June 1st, 1878.

That with a change of residence Comstock did not reform, but after a year or two fell back again into his old habits of intemperance, was established by the following testimony:

Edward A. Goddard testified that in 1876 Comstock lived in his house, in Brooklyn, for four or five months, during which time he saw him under the influence of liquor two or three times at his house, which was the occasion of his leaving there (Record, p. 41).

Albert G. Wood testified that he saw him considerably intoxicated in the spring of 1877, at the Coleman House, and again in the spring of 1878, on Sixth avenue (Record, p. 20).

Orrin C. Frost testified that he had business connections with Comstock, commencing in the beginning of the winter of 1875 to 1876, and extending to January or February, 1878; that six or eight months after their partnership began (some time in 1876), he saw him under the influence of liquor at their office; that he stayed away from the office sometimes for days, not to exceed a week

at a time, claiming it to be on account of malaria ; that in the fall of 1877 he told witness that he had been on a spree ; that in January or February, 1878, he saw him at the Grand Hotel, suffering from the effects of a spree, when he had been away from the office three or four days, and looked as if he had been through a siege of very severe sickness, whereupon the witness dissolved the partnership (Record, pp. 33, 34, 35).

George W. Hoagland testified that he entered into partnership with Comstock May 1st, 1878 ; that the last of May or the first of June, 1878, on a Saturday evening Comstock left the office all right, but did not come down Monday or Tuesday following, whereupon the witness went to his place of business on Sixteenth street and found him drunk ; that the witness thought Comstock came down to the office on Wednesday for a little while, but was not yet able to do business, when he told him that he must either quit drinking or else he would dissolve the partnership, whereupon Comstock wrote out a pledge not to drink any more so long as they were associated in business, which pledge bears date June 1st, 1878, and was written, to the best of witness' recollection, on Wednesday or Thursday, and shows that Comstock was then suffering from the effects of his debauch (Record, pp. 31, 32, 33).

There is no testimony to contradict or modify this, and it appears therefore conclusively that after he came to New York, which must have been towards the end of 1875, during five months in 1876 he was drunk two or three times at his boarding house in Brooklyn, so that he had to leave there ; that he appeared drunk once at his office ; that in the spring of 1877 he was seen drunk on Sixth avenue by Wood, and in the fall of 1877 told Frost that he had been on a spree ; that in January or February, 1878, he had a severe spree lasting three or four days and ending with prostration and sickness, so that Frost dissolved partnership with him, and that imme-

diately prior to the 1st of June he had another severe spree ending with sickness and prostration and a pledge of total abstinence to secure a continuation of the partnership with Hoagland. *We have thus, besides the evidence of intoxication in 1876 and 1877, the fact established, that from the fall of 1877 until June 1st, 1878, a period of say nine months, he had three severe prolonged sprees.*

Conclusion.

Thus, by uncontradicted and unimpeached testimony the defendant established at the trial that for eight years preceding June 1st, 1878, Comstock had been the victim of severe periodical sprees and debauches of intemperance, as described by the defendant's witnesses, occurring at intervals of from one to three or four months, lasting for a number of days and ending usually in sickness and prostration, and that then, under the threat of dissolution of partnership, having had another partnership dissolved for the same reason but four or five months before, he gave the pledge to Hoagland of total abstinence during the existence of their partnership. Nine months and a half afterwards he wrote this application for insurance, and therein in answer to the question: "*Are you or have you ever been* in the habit of using alcoholic beverages or other stimulants?" said "yes, occasionally." The question and answer referred to the present and the past, and the answer was not true in its ordinary acceptation, or in the meaning which it sought to express and did convey; instead of his having been in the habit of using stimulants "*occasionally*," only, the fact was and was suppressed by Comstock that, until nine months and a half before, for a period of eight years, he had been addicted to the habit of those periodical excesses of intemperance, and since then only had kept sober

for fear of dissolution of his partnership. If he had answered "yes" simply, it would have been true. The "occasionally" was intended to give an untrue impression.

The application signed by Comstock contained this explicit statement: "It is hereby declared that the above are the applicant's own *fair and true answers* to the foregoing questions, *and that the applicant is not and will not become habitually intemperate* * * * and that any untrue or fraudulent answers, *any suppression of facts in regard to the applicant's* health, *habits* or circumstances material to the risk * * * shall vitiate the policy." I submit that the above was not a fair and true answer, that it was both a *suppressio veri* and a *suggestio falsi*, that thereby the policy became void, and that the Court erred in refusing the instruction asked for.

Point V.

The seventh and eighth errors assigned will be considered together and are for the refusal to give the following instructions, to wit: "If the jury should find from the evidence that for six or seven years immediately prior to the first day of June, 1878, Erwin G. Comstock had been addicted to periodical sprees lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkeness, until sickness and prostration would intervene and terminate the spree; that such sprees would occur once in every three or six months or thereabouts; that on the first day of June, 1878, after termination of one of such sprees, under threat of dissolution of partnership from

his then partner, Mr. Hoagland, he gave a written pledge not to drink any more so long as he and Hoagland were associated in business; that his partnership with Hoagland ceased on the first day of May, 1879; that afterwards, during the years 1880 and 1881, he again became addicted to such periodical sprees; that during the year 1880 he had at least three such sprees; that during the year 1881, up to the latter part of April of that year, he had a number of such sprees of great intensity; that in one of those sprees, in or about the month of April, 1881, he subjected himself to the restraint of a nurse for several weeks in order to prevent himself from obtaining liquor; then the jury must find for the defendant" (Record, pp. 66, 67.)

"If the jury find from the evidence that after the making of the policy of insurance during the years 1880 and 1881, Erwin G. Comstock became addicted to periodical sprees lasting for a number of days, or even a week or more each time, when he would use intoxicating liquors to such ~~extent and~~ excess as to produce continued drunkenness, and prostrate him and make him sick for several days; that such sprees occurred in or about the month of March, 1880, in or about the month of July, 1880, again in or about the month of August, 1880, again on or about the first of January, 1881; again in or about the month of February, 1881, and again in or about the month of April, 1881; that his last sprees in February and April, 1881, were of such intensity that towards the close of the drinking period, when sick and prostrated, he subjected himself to nurses for a week and more each time, in order that they might assist him to become sober, then they must find for the defendant." (Record p. 67.)

The learned trial Judge, after briefly but fairly referring to the testimony produced by the Insurance Company concerning Comstock's debauches, instructed the jury to find for the defendant, if they found that after the making of the policy Comstock became

so far intemperate as to impair his health (Record, pp, 62, 63). Thereupon, after commenting on the evidence produced by the bank, he said: "It seems to me the point of difference between the plaintiff and defendant is upon the weight you give to the testimony of the defendant's witnesses."

While this charge of the Court was unobjectionable as far as it went, I respectfully insist that the instructions which I subsequently asked, as above stated, specifically referring to the specific facts which the jury were warranted to find from the defendant's witnesses, if they were worthy of belief, together with the conclusion of law from such facts, should have been given by the learned trial Judge. It is an elementary principle of our jurisprudence that in a trial of an action before a jury the judge should give such instructions on principles of law, applicable to the case tried by him, as are warranted by the facts and material to the issue, and as are specifically asked by either party. The extent to which a judge will instruct a jury in his general charge is left to his discretion entirely; but a refusal to charge a correct proposition of law as above indicated upon the request of a party is error.

In order to show that the specific facts, upon the finding of which by the jury the conclusion to find for the defendant was predicated, were well warranted by the evidence, a review of it, in addition to that contained in the foregoing Point, will be necessary.

Comstock's habits after the issuing of the policy, April 17, 1879.

Albert G. Wood testified that in the winter of 1880 to 1881, he saw Comstock often under the influence of liquor; that he had rooms over witness' office then, and he saw him nearly every day; that he rented his rooms there in October, and he had been there about a month

when he first saw him under the influence of liquor; that he was very much intoxicated then; that he was under the influence of liquor several times during that fall; that he saw him in that condition on the average once a week during the winter from 1880 to 1881; that in January, 1881, Comstock moved across the street to Dr. Beach's house, where he lived for about six weeks, and had three or four sprees while there which would last him a week sometimes; that the first spree which witness observed was when Comstock lived over his office, which lasted three or four days, witness taking care of him to some extent; that the next spree was when he moved to Dr. Beach's house; that he saw him at one time very much bruised on his limb and head while he lived at Beach's; that from Beach's he moved to Pfaff's, 32 West Twenty-fourth street, and stayed there perhaps two months; that while he lived there he was on a spree about all the time; that witness saw him at the St. Omer Hotel two or three times, the last time Friday before he died, when he was intoxicated; that before that he saw him on Fourteenth street at Mrs. Bean's house, considerable intoxicated (Record, pp. 21, 22).

Mrs. Orlena G. Starin testified that Comstock lived at her house, in West Thirty-fourth street, from June until October, 1880; that he roomed there at first for about four weeks, without board, and after that with board. That in the first six weeks he was temperate, and then for the next two weeks he went on a spree. That the first that she saw of it was that a coachman brought him there very much intoxicated, so much so that he had to carry him upstairs. That, being informed by another boarder that there was an odor of gas in Comstock's room, she went up, and finding the door locked, climbed over the glass in the closet, and found Comstock lying helplessly drunk on the floor, when she pulled him over to the bed, lifted him on it, and covered him up. That during the two weeks

of this spree, she found him twice sitting on the stairs of the second floor, and spoke to him, but found him speechless and helpless, so that she helped him into his room and on his lounge. That she remonstrated with him during this time, and he said that he would stop drinking. That she sent his meals up to him, and begged him not to go out nor to be seen drunk; and he said if she would send for a bottle of brandy and a syphon of Vichy water he would remain in the house until he got over it, which she did. That after that he remained sober for two or three weeks, and then had a second spree of about two weeks' duration, during which time she saw him in his room once, when she found that he had fallen over a chair and broken it, and had hurt himself, and was very much intoxicated. That he didn't come to the table during these two weeks. That other borders were threatening to leave, and she promised to speak to him, and that it was two weeks' before he got so that she could speak to him (Record, pp. 28, 29, 30).

Mary E. Bean testified that she was a professional nurse, living in Fourteenth street. That Comstock came to her rooms, in the last part of February, 1881, very much intoxicated, saying that he had been drinking. That he asked her to take care of him, and remained with her for about a week, a part of the time confined to his bed (Record, pp. 30, 31).

George W. Hoagland testified that his partnership with Comstock was dissolved May 1st, 1879; that afterwards, in March, 1880, he saw him on Broadway, opposite the Grand Hotel, drunk, held up by two friends, not in a condition to be talked to. That four or five days afterwards he went to the Grand Hotel to see him and found him sick from being drunk, and prostrated. That he then said he had been on a "tear," and was getting over it, and that he would be all right in a few days (Record, pp. 31, 32, 33).

Mrs. Mathilda Pfaff testified that Comstock moved

to her house, 32 West Twenty-fourth street, the last of January, 1881, and remained there until after the 1st of April. That she saw him sometimes lying in his room on his bed with his clothes on at four or five o'clock in the afternoon, and several times when he was not able to walk straight, she couldn't recollect how often, but wanted him to leave the house, because she didn't want to keep anybody under the influence of liquor (Record, pp. 35, 36).

Sarah Parker, servant of Mrs. Pfaff, testified that Comstock came to the house at the end of January and left about the middle of April. That she first saw him under the influence of liquor about three or four weeks after he came there. The next time on another day. Then again she saw him lying in bed with his clothes on and the door open. That she saw him at other times under the influence of liquor. That she saw him staggering while passing by from up-stairs a couple of times, but could not tell how many times she saw him in that condition (Record, p. 36).

William H. R. Dubois testified that he was a stock-broker; that he was employed by Comstock when his office was at 120 Broadway; that in March, 1880, he saw him first in his office under the influence of liquor; that a day or two afterwards he went to the Grand Hotel and found him drunk, and again, about a day after, he went there and then Comstock said to him, "I have been on a terrible drunk, but I am not going to drink any more;" that the period of that spree covered a week or ten days, and that at the last interview he appeared entirely prostrated, nervous and very ill (Record, pp. 36, 37).

James G. Beach testified that he saw Comstock under the influence of liquor on the first day of January, 1881, when he had just moved into witness' house; that his condition was that of getting over a spree; that Comstock wanted him to paint his eyes, which had been blacked in some way, to

of this spree, she found him twice sitting on the stairs of the second floor, and spoke to him, but found him speechless and helpless, so that she helped him into his room and on his lounge. That she remonstrated with him during this time, and he said that he would stop drinking. That she sent his meals up to him, and begged hin not to go out nor to be seen drunk; and he said if she would send for a bottle of brandy and a syphon of Vichy water he would remain in the house until he got over it, which she did. That after that he remained sober for two or three weeks, and then had a second spree of about two weeks' duration, during which time she saw him in his room once, when she found that he had fallen over a chair and broken it, and had hurt himself, and was very much intoxicated. That he didn't come to the table during these two weeks. That other borders were threatening to leave, and she promised to speak to him, and that it was two weeks' before he got so that she could speak to him (Record, pp. 28, 29, 30).

Mary E. Bean testified that she was a professional nurse, living in Fourteenth street. That Comstock came to her rooms, in the last part of February, 1881, very much intoxicated, saying that he had been drinking. That he asked her to take care of him, and remained with her for about a week, a part of the time confined to his bed (Record, pp. 30, 31).

George W. Hoagland testified that his partnership with Comstock was dissolved May 1st, 1879; that afterwards, in March, 1880, he saw him on Broadway, opposite the Grand Hotel, drunk, held up by two friends, not in a condition to be talked to. That four or five days afterwards he went to the Grand Hotel to see him and found him sick from being drunk, and prostrated. That he then said he had been on a "tear," and was getting over it, and that he would be all right in a few days (Record, pp. 31, 32, 33).

Mrs. Mathilda Pfaff testified that Comstock moved

to her house, 32 West Twenty-fourth street, the last of January, 1881, and remained there until after the 1st of April. That she saw him sometimes lying in his room on his bed with his clothes on at four or five o'clock in the afternoon, and several times when he was not able to walk straight, she couldn't recollect how often, but wanted him to leave the house, because she didn't want to keep anybody under the influence of liquor (Record, pp. 35, 36).

Sarah Parker, servant of Mrs. Pfaff, testified that Comstock came to the house at the end of January and left about the middle of April. That she first saw him under the influence of liquor about three or four weeks after he came there. The next time on another day. Then again she saw him lying in bed with his clothes on and the door open. That she saw him at other times under the influence of liquor. That she saw him staggering while passing by from up-stairs a couple of times, but could not tell how many times she saw him in that condition (Record, p. 36).

William H. R. Dubois testified that he was a stock-broker; that he was employed by Comstock when his office was at 120 Broadway; that in March, 1880, he saw him first in his office under the influence of liquor; that a day or two afterwards he went to the Grand Hotel and found him drunk, and again, about a day after, he went there and then Comstock said to him, "I have been on a terrible drunk, but I am not going to drink any more;" that the period of that spree covered a week or ten days, and that at the last interview he appeared entirely prostrated, nervous and very ill (Record, pp. 36, 37).

James G. Beach testified that he saw Comstock under the influence of liquor on the first day of January, 1881, when he had just moved into witness' house; that his condition was that of getting over a spree; that Comstock wanted him to paint his eyes, which had been blacked in some way, to

enable him to make New Year's calls; that after he left witness' house he saw him go down Twenty-fourth street—staggering, on one occasion (Record, pp. 37, 38).

Andrew E. Farrell testified that he was a bartender at the St. Omer Hotel, in 1881, and knew Comstock, probably two or three weeks before his death; that he saw him, on several occasions, under the influence of liquor in the barroom of the hotel; that he used to vary in his drinking; that some days he drank more than others; that about two or three days before he died he came into the barroom and drank two or three drinks, and then fell against a chair or a table; that he was paralyzed at the time, and witness took his jewelry away from him—his watch, chain and pin—and gave them to the bookkeeper to take charge of them, at the office; which was the last time that he saw him drunk; that the watch and chain remained in the office up to the time of his death (Record, pp. 38, 39).

Peter Treadwell (a colored man), testified that he was thirty-four years old. That on the 18th day of April, 1881, having been sent by Mr. Woods to Comstock, the latter employed him to take care of him; that Comstock was under the influence of liquor at the time; that he attended upon him for two weeks, day and night; that Comstock was up and down during the day time, not in bed all the time, and to some extent during the two weeks under the influence of liquor; very much so when witness first saw him; that witness was to keep him from drinking, and tried to do so, and succeeded to some extent; that he told witness that he wanted to get sobered up; that witness moved his things from Twenty-fourth street to the St. Omer Hotel; that he went with him to his meals and remained in the room; that he stayed with him all the time, and yet he would get drunk occasionally (Record, pp. 39, 40).

Robert Clark testified that he was night watchman at

the Grand Hotel in 1877 up to the fall of 1880; that about the month of March, 1880, he saw Comstock under the influence of liquor, and took care of him for about a week (Record, pp. 41, 42).

The testimony of none of the witnesses for the bank contradicted that of the company's witnesses or modified the facts proven. None of the bank's witnesses knew Comstock or saw him socially, or evenings, except Haines and Nixon, on two or three specified evenings, and Mason on certain specified days; none saw him at any of the periods when he was on one of his periodica debauches testified to by the company's witnesses. The testimony is entirely reconcilable, as the company's witnesses saw him about his periodical drunken sprees about which they testified, and the bank's witnesses saw him when he was sober and able to show himself in business.

Concerning the Character and Duration of Comstock's Sprees, in 1880-81.

From March, 1880, until his death, June 29th, 1881 (fifteen months), the uncontradicted testimony thus shows seven distinct sprees, besides that in November, 1880, testified to by Wood alone, recurring at an interval of about two months from each other.

Spree in March, 1880.

Dubois testified: "In March, 1880, I saw him under the influence of liquor, first in his office at No. 120 Broadway. A day or two afterwards I went to his hotel and found him drunk. I went again about a day after to see him at his hotel. * * * I went into his room and he told me: 'Dubois, I have been on a terrible drunk, but I am not going to drink any more.'

* * * He appeared entirely prostrated and nervous and very ill. * * * The period covered by these three interviews that I saw him drunk, was from a week to ten days" (Record, pp. 36, 37).

Clark, a friend of Comstock, night watchman, testified: "About the month of March, 1880, I saw him under the influence of liquor. Part of the time that he was in that condirion I took care of him. I called in several times in the day and several times in the evening for about a week. He kept going in and out all the time; he was slightly intoxicated part of the time. I can not say that he was considerably intoxicated. He did not stagger. He was able to take care of himself. He did not ask me to take care of him. I went there merely as a friend. * * * He was over the spree in about three weeks (Record, p. 41).

Hoagland testified: "In March, 1880, I saw him on Broadway, opposite the Grand Hotel; he was drunk. I spoke to him; I just barely nodded to him, because he was with two friends and they were holding him up; he was not in a condition to be talked to. * * * After that he was sick. I went to the hotel to see him, after I saw him in the street. I suppose he was sick from being drunk. He was prostrated; could not do anything. It was four or five days after I saw him in the street that I visited him. I talked with him about his having been drunk then. He said he had been on a 'tear' and was getting over it, that he would be all right in a few days" (Record, p. 32).

Sprees in July and August, 1880.

Mrs. Starin testified: "In the first six weeks he was temparate, and then for the next two weeks he went on a spree. The first that I remember of this spree was when a coachman brought him there very much intoxicated; so much so that he had to carry him up stairs.

* * * I climbed over the glass in the closet and got entrance into the room, and Mr. Comstock was lying helplessly drunk on the floor. I pulled him over to the bed in the alcove and lifted him on the bed and covered him up. * * * During the two weeks of his spree I twice had occasion to go up on the second floor, and found him sitting on the stairs leading to the third floor, and I spoke to him because he obstructed the way, and I asked him what he was sitting there for, and he seemed to be speechless and helpless both, and the door was not locked and I opened it and led him into the room and laid him on the lounge. * * * He did not come to his meals and I sent them to him, and begged him not to go out and be seen coming in drunk, and he said if I would send for a bottle of brandy and a syphon of vichy water he would not go out any more and would remain in the house until he got over it. * * * After that I think he remained sober for two or three weeks; it might have been a little longer. He then had a second spree of about two weeks duration, and during that time I had occasion to go up stairs only once. My attention was called to a heavy fall up stairs, and I went up stairs and found that Mr. Comstock had fallen over a large Turkish chair and broken the arm of the chair, and also hurt his head on the corner of the chair. * * * He was very much intoxicated then, and I didn't attempt to talk with him. * * * He did not come to the table during the two weeks. When I found him sitting on the steps, his clothes were very much soiled and his face very much discolored" (Record, pp. 28, 29).

Sprees in November, 1880, and about January 1st, 1881.

Beach testified: "I saw him under the influence of liquor on the first of January when he had just moved into the house. I saw him in his room. His condition

was, I should judge, that of getting over a spree. He told me that he had sent for me to come and see him about his eyes. His eyes had been blacked in some way or other. He sent for me if I could not fix them up so that he could make some calls; by fixing them up, I mean painting them" (Record, p. 37).

Wood testified about a spree in November, 1880: "The first that I observed these sprees was when he lived where my office was. My recollection is that that lasted three or four days. I met him up Broadway, he was very much intoxicated. I helped him home and helped him to bed. The next time I went up to him I found him sobered up some. I went to him every day or two after that I think. My recollection is that he was in his rooms a couple of days at that time." And further he testified: "I think the next I was with him at any time when he was on a spree was after he had moved across the street to Dr. Beach's, where he occupied the back parlor. My recollection is that he had a spree shortly after he lived there, a few days after, and that he was on a spree a good part of the time while he was living there. * * * I saw him at one time very much bruised on his limb and on the side of his head while he lived at Dr. Beach's. I attended to his bruises with liniment at that time. He was intoxicated so that he hardly knew who I was. I stayed with him until quite late that night" (Record, pp. 21, 22).

Spree in February, 1881.

Mrs. Pfaff and Sarah Parker testified that they saw him a number of times intoxicated, staggering, lying on his bed with his clothes on (Record, pp. 35, 36).

Mrs. Bean, the nurse, testified: "I had occasion to attend Comstock professionally in the last part of February, 1881, at my rooms at 103 West Fourteenth street. He was there about a week; he had been drink-

ing when he came there. * * * He grew very ill before night so that he could not get away. He asked me to take care of him. He seemed to be very nervous and complained of distress. He was under the influence of liquor. He could not walk very straight. I kept him there at my rooms. He sent for one of his gentlemen friends, Mr. Wood" (Record, pp. 30, 31).

Wood testified: "From Dr. Beach's he moved to Pfaff's, No. 32 West Twenty-fourth street. I should think he stayed there perhaps two months. While he lived there I met him about as often as I did at the other place. My recollection is, that while he lived there, that he was on a spree about all the time * * * I saw him there, in Fourteenth street, at Mrs. Bean's house; she sent for me. Mrs. Bean is a nurse. I found Comstock there considerably intoxicated" (Record, p. 22.)

Spree in April, 1881.

Peter Treadwell testified: "He employed me to take care of him. He was under the influence of liquor at the time. I attended upon him for two weeks, day and night. He was not in bed all the time. He was up and down during the day-time. He was under the influence of liquor during the two weeks to some extent. When I first saw him he was very much under the influence of liquor, after that not so very much. I never saw him stagger but once to my recollection, that was when I first saw him. * * * I considered I was there to keep him from drinking much. I tried it. I did succeed to some extent. I went with him when he went down town. I understood he wanted me to keep him from drinking. He told me that he wanted to get sobered up. * * * I came to him on the 18th of April and stayed with him about fifteen days. He told

me he wanted to get sobered up. Then I helped him. He seemed to be in good health, and all that I saw was that he had been drinking. * * * I went with him to his meals. I didn't take my meals with him, but remained in the room. I do not know whether he wanted me to. I stayed with him all the time and yet he would get drunk occasionally" (Record, pp. 39, 40).

His Last Spree.

Andrew F. Farrell testified: "I probably knew him two or three weeks before his death; at that time I was employed at the St. Omer Hotel as bartender. * * * On several occasions I have seen him under the influence of liquor in the bar-room of the hotel. * * * He used to vary in his drinking; some days he drank more than other days. I saw him drunk during these days immediately before his death. I think it was about two or three days before he died he came into the bar-room and drank two or three drinks, and then fell against a chair or table; he was paralyzed at the time. I took his jewelry away from him, his watch and chain and pin, and gave them to the bookkeeper to take charge of them at the office. I think that was the last time I saw him drunk" (Record, p. 38).

Wood testified: "I saw him at the St. Omer Hotel two or three times, but was never in his room. I saw him in the barroom; he was intoxicated then each time that I saw him. I think I saw him Friday before he died; he was intoxicated then. I met him then at the corner of Twenty-fourth street and Sixth avenue, and walked back with him to the hotel. * * * At the time, on Friday before his death, he was very much intoxicated. I took his arm, and walked back to the hotel with him. He seemed to be in a dazed condition, and hardly knew what he was doing at the time. He took a glass of

soda, or something of that kind, and then went upstairs. I accompanied him to the stairs and left him there" (Record, p. 22).

This review must satisfy the Court that the jury might well have been warranted to find the facts recited in the two last mentioned requests of instruction, and if they had so found on either request, I submit that a verdict in favor of the company was a necessary conclusion of law.

The first of these two last requests covers the entire period for nine or ten years before Comstock's death, and shows a state of facts that it would be a reproach to our law if it failed to pronounce the individual a man of intemperate habits to whom these facts would apply. *A man must be either temperate or intemperate in his habits.* True, he may be temperate for a time and intemperate for another time; but if for nine or ten years in succession, with the possible interruption of about a year and a half of enforced sobriety, he was subject to such periodical fits of intemperance as these described, increasing in violence and frequency towards the last year before his death, compelling him to submit himself to the restraint of a nurse for several weeks to prevent himself from obtaining liquor, it seems to me to be impossible to call him a man of temperate habits.

Again: *the last request* even more pointedly shows a state of facts well warranted by the evidence to be found by the jury, from which a conclusion of law that Comstock had not become a man of intemperate habits, could only be accounted for if we were a nation of drunkards.

Resuming his former habits of intemperate debauches in March, 1880, the facts recited in the last request, if found by the jury, would show Comstock to have had during the last fifteen months of his life at least seven fits of intemperance as therein described, lasting for days or even a week or more each time, when he would use intoxicating liquors to such extent and excess as to

produce continued drunkeness and prostrate him and make him sick for several days; would show him a victim to his intemperate excesses to such an extent that in his two last debauches in February and April, 1881, he was unable to break himself from it, even temporarily, without the aid of other persons whom he himself employed for that purpose, and who had to watch him for weeks to keep liquor away from him. He had then reached a point where the habit of excessive intemperance had so strongly grown upon him that *he was incapable of breaking himself of it, even temporarily, without the aid of other persons. The habit had become his absolute master.* The testimony of Treadwell, the colored nurse gives a vivid picture of the power of this habit over its victim (Record, pp. 39, 40).

He was staggering drunk when he employed Treadwell to "sober him up," and, notwithstanding this man's watchfulness day and night, he could not at first prevent him from becoming intoxicated, and the sobering-up process took two weeks. If the habit of intemperance and intoxication had not at that time existed with him to a fearful extent, to the extent of overpowering his will, he would not have needed this assistance. *He had ceased to be able to control his appetite, but his appetite controlled him and he knew that he was powerless against it. Such a condition of things can only result from habit,* and when it is reached, according to all experience of mankind, it would do violence to common sense and common understanding to say that the victim was not habitually intemperate.

Will this high and august tribunal pronounce such a state of facts insufficient to warrant the conclusion of law that a man to whom they apply is not *necessarily* one of intemperate habits? If so, it will place life insurance companies beyond the pale of protection against the well-known and universally-prevailing prejudice of juries in such matters. If the plaintiff in error in this case must be satisfied with the general charge of the

Court below on this subject, without a right to ask such specific instructions as were here proposed in order to test and bring their consciences to bear upon particular well-proven facts, it might as well abandon all hope of protecting itself against a violation of its contract in this respect.

I respectfully insist that the judgment below should be reversed and a new trial granted.

EDWARD SALOMON,
Of Counsel for the Plaintiff in Error.

122-501

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM. 1886.

No. 288.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Plaintiff in Error,

against

THE MUSKEGON NATIONAL BANK,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JNO. E. PARSONS,

Of Counsel.

BURGOYNE'S "Quick" Print, Cor. Walker and Centre Sts., N. Y.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1884.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,	No. 288.
vs.	October Term, 1886.
THE MUSKEGON NATIONAL BANK, Defendant in Error.	

In error to the Circuit Court of the United States for the Southern District of New York, upon a bill of exceptions by the plaintiff in error to review rulings of Mr. Justice Nathaniel Shipman on a trial before him and a jury.

The defendant in error is a National bank located and doing business in Michigan. It sued to recover the amount of a policy of life insurance issued by the plaintiff in error on or about April 17th, 1879, for the sum of $20,000 upon the life of one Erwin G. Comstock, to secure a debt of over $20,000 due from him to the bank (fol. 8).

The complaint alleged that Comstock died in the City of New York on June 29th, 1881.

The defense was:

First. That the policy was issued upon an application made by Comstock and the bank in which it was stated that Comstock was not then and would not become habitually intemperate; that the statement should form the basis of the insurance; and that any untrue or fraudulent answers and any suppression of facts in regard to

Comstock's health, habits or circumstances material to the risk, should vitiate the policy and forfeit all payments made thereon; that Comstock was at the time of making the application and prior thereto habitually intemperate; and that the statement that he was not then habitually intemperate was untrue.

Second. That the bank in and by the application and policy warranted that Comstock would not become habitually intemperate; that the policy was issued and accepted by the bank upon the condition that if Comstock should become habitually intemperate, or so far intemperate as to impair health or induce delirium tremens, the policy should be null and void; and that Comstock did after the issuing of the policy become habitually intemperate, and so far intemperate as to impair his health and induce delirium tremens.

Third. That the policy was issued and was accepted by the bank on the express condition that if Comstock should die by his own hand or act the policy should be null and void, in which case the company should return the premiums received less dividends paid on the policy, and that Comstock did die by his own act.

Judge Shipman, with the acquiescence of the plaintiff in error, instructed the jury that no question arose upon the third defense (fol 113).

There was a fourth defense, which was withdrawn by the defendant at the beginning of the trial.

Vide Fourth Defense, fol. 19. Withdrawal, fol. 30.

The only questions presented by the bill of exceptions relate therefore to the defense that Comstock prior to the policy had been habitually intemperate; and that subsequent to the policy he became habitually intemperate and so far intemperate as to impair his health and induce delirium tremens.

Comstock, down to about the middle of July, 1875 (fol. 33), was cashier of the bank. He had been in its employment from 1868 (fol. 41). Upon leaving its service he moved to the City of New York. He continued to reside there until June 29th, 1881, when he died (p. 4).

In answer to a question in the application asking whether Comstock was or ever had been in the habit of using alcoholic beverages or other stimulants, he said "Yes, occasionally" (p. 74).

Upon the question of Comstock's habits the Bank examined

EDWARD D. MATHER: He resided in Muskegon; had known Comstock since he was a boy. Saw him frequently. Could not answer whether he ever saw him under the influence of liquor; had heard about his being in the habit of going on sprees. Did not know that he had any more reputation than other men inthat respect.

SYDNEY S. MORRIS: He resided in Muskegon; knew Comstock from August, 1871, until he went to New York. Met him daily. Was not aware that he ever saw him under the influence of liquor. His appearance did not indicate that he was a man addicted to the use of intoxicating drink. He was of the opinion that Comstock did use liquor according to the habit of the place. Regarded him as temperate (fol. 84).

MICHAEL H. BRENNAN: Janitor of the Bank from October, 1874, until Comstock left in 1875. Never but twice saw Comstock under the influence of liquor, and that but slightly.

SAMUEL BORROWE: Vice-president of the Equitable Life Assurance Society of New York; was acquainted with Comstock two or three years prior to his death. He applied for an agency for the Equitable Company, and subsequently became a tenant of the Equitable Building. For nearly a year Mr. Borrowe saw him almost daily; prior to that time, once or twice a week. Saw him within a few months of his death. Comstock struck him as a very energetic, active man; down at his office early, particular about his dress. He never saw him in such circumstances as suggested that he had been drinking.

HOSMER B. PARSONS: Assistant secretary for Wells, Fargo & Co.; was acquainted with Comstock for four or five months before his death, in 1881, seeing him three or four times a week. He was a very energetic man, prompt in his business. Struck the witness as being a very particular man; no suspicion ever crossed his mind that he drank liquor at all.

CHARLES B. HAINES: Clerk in the City Bank of New York, knew Comstock from February, 1881, down to his death. Saw him almost daily. Never saw any indication in him that he had been drinking, or was under the influence of liquor.

JAMES M. GOODSALL, publisher. Knew Comstock from the time he was three or four years old down to his death. From the time that Comstock came to New York saw him almost daily at times, and at other times twice a week. Never saw him drunk; never saw him under the influence of liquor, or indicating in any way that he had been drinking at all. He always seemed to the witness to be possessed of a great deal of nervous energy and strength. He told witness that he was not in the habit of using liquor, and never did, except to alleviate physical pain.

GERALD R. BROWN: Manager of the Equitable Life Assurance Society. Saw Comstock frequently from September 3d, 1878, until February 1st, 1881, during which time he was a tenant of the Equitable Building. Comstock always struck him as being very energetic, a sharp, shrewd business man. Never saw anything about him to justify the charge that he was a man of intemperate habits.

ABRAHAM B. MILLER: Connected with the Grand Hotel and the Park Avenue Hotel, of New York. Knew Comstock from 1862. From 1878 to 1880 (this covers the issuing of the policy) saw him about twice a day, and from then on to his death saw him once a week or once a fortnight. Never saw him under the influence of liquor, and only once saw him take a drink; nothing ever occurred to lead him to suspect that Comstock was a drinking man; "he was the personification of neatness and tidiness and had a general business way about him and was always in a hurry."

JOHN M. NIXON, stock broker. Knew Comstock from February, 1881, until his death. Never saw him under the influence of liquor. Never saw anything about him to indicate that he ever drank a drop of liquor in his life.

LYMAN G. MASON, director of the bank. Became acquainted with Comstock in 1869. Saw him last in New York in March, 1881. In September, 1875, Comstock was under the influence of liquor a short time; from 1869 to 1875 on two or three occasions. Never saw him under the influence of liquor after he came to New York; had stayed with him there.

Against this evidence for the bank, the company examined witnesses to show that Comstock would occasionally go on sprees, or,

to use the expression of Nathaniel A. Barney, a hotel keeper, whose evidence was read for the company, he would be on little "toots" (fol. 43).

Among others William B. McLaughlin, who, as agent of the company, issued the policy and subscribed the agent's statement in which he said that there was nothing in Comstock's customs or appearance which indicated irregular habits or intemperate living (p. 75), testified that Comstock used to be under the influence of intoxicating liquors at times while at Muskegon (fol. 32).

JOHN TORRENT, a lumber man residing at Muskegon, testified that he had known Comstock six or seven years. Knew that he was addicted to the use of intoxicating liquors. Had seen him drunk; had drunk with him. Knew of his being on prolonged sprees. The habit prevailed more or less during the time that Comstock lived at Muskegon. When he was not drinking he was pretty smart, active, talkative and of good business qualifications generally; was an energetic man and appeared to be a healthy man.

The other evidence taken for the company was thus summarized by Judge Shipman in his charge:

The company says (fol. 115) that in New York the testimony of Wood and Goddard shows that Comstock occasionally, in 1876 and 1877, indulged somewhat freely at times in stimulants. It is claimed that in the fall of 1877 he had one of these sprees. That in January or February, 1878, he had a spree when Frost dissolved partnership with him. That in June, 1878, he had another spree when Hoagland obtained his pledge that he would abandon drinking, which Comstock probably must have kept for something like a year or more. During that interval the application was made and signed. In March, 1880, Robert Clarke testified that he took care of him for a week or more after a spree. Mrs. Starin testified that in July, 1880, and in August, 1880, or about that time, with two weeks intervening, he had two occasions of this sort. In January, 1881, which was the time he went to Dr. Beach's house and took rooms there, you recollect the testimony of both Dr. Beach and Mr. A. G. Wood as to his condition. In February, 1881, Mrs. Bean, the nurse, testified that he voluntarily placed himself under her care and that she attended to him after one of these attacks. In April, 1881, he had the nurse Treadwell for something like two weeks after an occasion of this sort. He voluntarily put himself under the care of the colored boy so that he might be kept from the further use of liquors. In June, 1881, that is, immediately preceding his death, Farrell testifies in regard to his habits at the St. Omer Hotel.

Upon this testimony Judge Shipman instructed the jury.

"Upon the first defense, it is true that any untrue or fraudulent answers, or any suppression of facts which are the subject of inquiry in the application which were material to the risk, have the effect to avoid the policy."

"While the materiality to the risk of the facts which are suppressed is a question of fact for the jury, there would be no controversy, I suppose, that when the question of the use of intoxicating liquors was presented (and Comstock, as a matter of course, knew the facts in the case), if he was, at the time of making the application, the victim of an appetite which impelled him to frequent and prolonged sprees, or to the frequently recurring, violent and excessive use of alcoholic liquors for days, that such a fact was one which was material and important to the character of the risk which the defendant company was assuming."

"The real question upon the first defense is: Was Comstock, at and prior to the time he made the application, habitually intemperate? Or, in other words, was he in such frequent use of intoxicating liquors that the practice of drinking to excess had become a habit to which he was subject?"

"The second defense presents the same question. At the time subsequent to the application did Comstock, after the policy was issued, become habitually intemperate, or so far intemperate as to impair his health? If he was, at or prior to the application—and when I say 'before the application' I mean for such a consecutive time up to the time of the application as to create a habit of life, habitually intemperate—habitually indulging in violent excesses in the use of liquors; or if he was, after the date of the policy, viz., after April 17th, 1879, habitually intemperate, or so far intemperate as to impair his health—in either of those events the policy was avoided and your verdict must be for the defendant."

"The plaintiff agreed and covenanted that Comstock should not become an habitually intemperate man, and if he did, that the policy of insurance was to be at an end; and the simple question in this case is, was there a breach or not of the contract? If yes, the policy is void; if not, the policy is good. And the question is to be determined, like other questions of a breach of contract, by a preponderance of evidence."

"I think there is no rule of law which says that, in order to make a man a drunkard, he must drink every day or every week to excess. Neither, on the other hand, does a single or an occasional excess make a man an habitual drunkard; but, if you find that the habit and rule of a man's life is to indulge periodically and with frequency and with increasing frequency and violence in excessive fits of intemperance, such a use of liquor may properly cause the finding of habitual drunkenness. It is the fact of the certainty of these periodical sprees accompanied with their frequency which marks the habit. If a man should indulge in such a debauch once in a year only, it could not, in my opinion, properly be said that he was an habitual drunkard; he would be an occasional drunkard.

But if such debauches increased in frequency, and the certainty of their increasing frequency becomes established, then the time finally arrives when the line between an occasional excess and habit is crossed. It is for you to say whether Comstock was at the time of the application, or became afterwards, the victim of such a habit."

Subsequent to the charge, the counsel for the company requested the Court to charge the jury as follows:

1. "To be habitually intemperate it is not necessary that a person should be addicted to the excessive use of intoxicating liquors continually, or without interruption; but a person who, during a period of time sufficient to form a habit in that respect, is addicted to periodical 'sprees' of longer or shorter duration, when for days in succession he drinks intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness compel a cessation, and terminate the 'spree,' comes within a definition of being habitually intemperate, although such person may remain sober for a month, three or six months, or even a year at a time."

The Court refused the request and the counsel for the company excepted.

Counsel for the company further requested the Court to charge as follows:

2. "If the jury find from the evidence that for seven or eight years immediately prior to the 17th day of April, 1879, Erwin G. Comstock was addicted to periodical 'sprees,' when for several days, and sometimes for a week or more in succession, he would drink intoxicating liquors to great excess, producing a state of continued drunkenness until prostration and sickness intervened, then they must find for the defendant, although they may find that he would remain sober for a month, three or six months, or even a year at a time."

The Court refused the request, and the counsel for the company excepted.

The counsel for the company further requested the Court to charge as follows:

3. "It was the duty of the plaintiff and of Erwin G. Comstock in their application for this policy of insurance to communicate to the defendant the fact that for six or seven years immediately prior to the first day of June, 1878, Comstock had been addicted to

periodical sprees, lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, although he might remain sober for a month, three or six months, or longer, even, at a time; and their failure to disclose such facts to the defendant avoids the policy, and the jury must find for the defendant."

The Court refused the request, and the counsel for the company excepted.

The counsel for the company further requested the Court to charge as follows:

4. "If the jury should find from the evidence that for six or seven years immediately prior to the first day of June, 1878, Erwin G. Comstock had been addicted to periodical sprees, lasting for a longer or shorter period, when for days in succession he would drink intoxicating liquors to great excess, producing continued drunkenness, until sickness and prostration would intervene and terminate the spree; that such sprees would occur once in every three or six months, or thereabouts; that on the first day of June, 1878, after termination of one of such sprees, under threat of dissolution of partnership from his then partner, Mr. Hoagland, he gave a written pledge not to drink any more so long as he and Hoagland were associated in business; that his partnership with Hoagland ceased on the first day of May, 1879; that afterwards, during the years 1880 and 1881, he again became addicted to such periodical sprees; that during the year 1880 he had at least three such sprees; that during the year 1881, up to the latter part of April of that year, he had a number of such sprees of great intensity; that in one of those sprees, in or about the month of April, 1881, he subjected himself to the restraint of a nurse for several weeks in order to prevent himself from obtaining liquor; then the jury must find for the defendant."

The Court refused the request, and the counsel for the company excepted.

The counsel for the company further requested the Court to charge as follows:

5. "If the jury find from the evidence that after the making of the policy of insurance during the years 1880 and 1881 Erwin G. Comstock became addicted to periodical sprees lasting for a number of days, or even a week or more each time, when he would use intoxicating liquors to such extent and excess as to produce continued drunkenness and prostrate him and make him sick for several days; that such sprees occurred in or about the month of March, 1880, in or about the month of July, 1880, again in or about the month of August, 1882; again on or about the first of January,

1881 ; again in or about the month of February, 1881, and again in or about the month of April, 1881 ; that his last sprees in February and April, 1881, were of such intensity that towards the close of the drinking period, when sick and prostrated, he subjected himself to nurses for a week and more each time, in order that they might assist him to become sober, then they must find for the defendant."

The Court refused the request and the counsel for the company excepted.

The company contend that there was error in these refusals.

Vide, pp. 81 and 82.

The company also asks the Court to review the following rulings, which it contends were erroneous.

They are thus alleged in the assignment of error :

"FIRST : That the Judge of said Circuit Court erred in sustaining at the trial of said action the objection to and excluding the following question and answer contained in the deposition of John Torrent, to wit :

Q. Up to the time your acquaintance with him ceased, what would you say as to whether his drinking had affected his health or impaired his vital powers in any respect ?

A. I think it had affected him very materially. I think it had affected his nerves, and impaired his health generally—general debility ; the symptoms of that were his general looks, and that the time he went away, or just before he was taken very sick, and they didn't know whether he was going to be alive or die ; that was the general impression.

SECOND. That said Judge erred in excluding at said trial the following sentence contained in said deposition, to wit : "I think he had the delirium tremens."

THIRD. That said Judge erred in excluding at said trial the following portion of the deposition of Nathaniel A. Barney, to wit :

Q. You had no understanding of that matter then, that he was trying to keep off delirium ?

A. I would say the matter was talked of between the doctor and myself about his condition, and when I went for him, and took him up to the room, I asked him if I had better telegraph for his mother and father, and Marvin said we better consult with him and see what he thinks.

Q. Weren't you afraid he was going to have delirium ?

A. I was afraid he might.

Q. Don't you know that the doctor was apprehensive of it ?

A. Well, I asked the doctor and he thought there was no immediate danger. He thought he could check it so there would be no immediate danger.

A few general propositions will dispose of the various errors assigned by the company.

First.

The company was informed by the application that Comstock was *in the habit* of using alcoholic beverages and other stimulants *occasionally.* (P. 74.)

The provision of the policy (p. 71) that if he became "habitually intemperate or so far intemperate as to impair health or induce delirium tremens," the company might cancel the policy; and the statement of the application that Comstock was not and would not become habitually intemperate are to be construed with reference to this statement. The policy provides that it is issued upon the faith of the statements contained in the application. (P. 70.)

Question 16 of the application did not inquire whether Comstock ever took a drink. It did not ask whether he ever went on a spree. It did not even inquire how frequently, if at all, he drank or went on a spree. What it asked was whether he was "*in the habit*" of using alcoholic stimulants. This question meant just what it asked. The answer informed the company that Comstock was *in the habit* of using alcoholic stimulants.

It may well be therefore that the company could not claim by way of defense that Comstock was intemperate prior to the issuing of the policy.

He did not by the application claim to be temperate. On the contrary, he said that he was in the habit of using intoxicating drinks. This of course implied that he was in that habit to the extent and in the sense intended by the question, *i. e.*, to such extent as to be material to insurance upon life.

In a recent case in this Court, where the insured stated that he was of temperate habits, it was held that it was not a defense that he might have had an attack of delirium tremens from an exceptional overindulgence.

Insurance Co., vs. Foley, 105 U. S., 350, (1881):

The Company in its defense alleged that plaintiff had not made true statements to certain questions contained in the application,

viz.: "Is the party of temperate habits? Has he always been so?" The answers were "Yes," when in fact he was a man of intemperate habits.

FIELD, J.: "When we speak of the habits of a person we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. * * * The Court did not, therefore, err in instructing the jury that if the habits of the insured, 'in the usual, ordinary and every-day routine of his life, were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have an attack of delirium tremens from an exceptional overindulgence. It could not have been contemplated from the language used in the policy that it should become void for an occasional excess by the insured, but only when such excess had by frequent repetitions become a habit."

Second.

If, however, the law of the case was that habitual intemperance, past or future, constituted a defense, the company could not ask upon the subject more favorable instructions than those which were given by Judge SHIPMAN to the jury.

He told them that the real question was whether Comstock at and prior to the time he made the application was "*habitually intemperate*" (p. 61); whether subsequent to the application he "became habitually intemperate, or so far intemperate as to impair his health."

He told the jury that in either case the policy was avoided.

He said to the jury that it was not contended for the plaintiff that frequent debauches lasting for days and accompanied by physical prostration and nervous derangement are justly and truly represented by the answer "I drink liquors occasionally."

And he added, "While the materiality to the risk of the facts which are suppressed is a question of fact for the jury, there would be no controversy, I suppose, that when the question of the use of intoxicating liquors was presented (and Comstock, as a matter of course, knew the facts in the case), if he was at the time of making the application the victim of an appetite which impelled him to frequent and prolonged sprees, or to the frequently recurring, violent and ex-

cessive use of alcoholic liquors for days, that such a fact was one that was material and important to the character of the risk which the defendant company was assuming."

Third.

And upon the question of what constituted habit; what made habitual intemperance, no more favorable instructions could be asked by the company.

Judge Shipman instructed the jury that if they found that the habit and rule of Comstock's life was to indulge periodically, and with frequency and with increasing frequency and violence, in excessive fits of intemperance, such a use of liquor might cause the finding of habitual intemperance. (Fol. 112).

The requests submitted by the company required Judge Shipman to say to the jury that a person was habitually intemperate if he was addicted to sprees, although he might remain sober for a month, three or six months, or even a year at a time; that if, during a period commencing six or seven years before June 1, 1878, and continuing down to April 1, 1881, Comstock, every three or six months or thereabouts did on various occasions, which were specified, drink to excess, he was habitually intemperate.

The real question was not whether Comstock went upon sprees. It was whether his doing so constituted a habit. The defense was that Comstock was habitually intemperate.

Worcester defines habit as a customary state resulting from the frequent repetition of the same acts; an habitual practice. He defines habitual as being in constant use; constant, customary, custom, etc.

Webster defines habit as the usual condition of a person or thing regarded as that which is had or retained; ordinary state; a fixed or established custom; ordinary course of conduct; hence prominently the involuntary tendency to perform certain actions which are acquired by their frequent repetition.

The distinction between that which is habitual and that which is occasional was correctly stated to the jury.

The requests submitted for the company left out the question of habit, or asked the Judge to tell the jury that excesses occurring at definite intervals did constitute a habit.

Fourth.

Whether Comstock was habitually intemperate was a question of fact to be decided by the jury. For the Court to tell them that a spree once a year or a certain number of sprees in a given period made a man habitually intemperate, was to take from the jury the very question upon which they were to pass.

Murray vs. Home Life Ins. Co., 9 Rhode Island, p. 346.
Swick vs. Home Life Ins. Co., 2 Insurance Law Journal, p. 415.
Union Mutual Life Ins. Co. vs. Reif, 10 do., p. 428.
Brockway vs. Mutual Benefit Iife Ins. Co., *Id.*, p. 762.
Holteroff vs. Mutual Benefit Life Ins. Co., 4 Big. Life & Acc. Ins. R., p. 396.
Knickerbocker Life Ins. Co. vs. Foley, 11 Federal Reporter, p. 676.

Fifth.

Even if the requests submitted for the company correctly stated the law, it was not error for the Court to refuse such instructions after it had properly instructed the jury upon the subject.

A party has no right to dictate the language in which the Court shall instruct the jury, or after the Court has charged fully and properly upon the subject, to require it to repeat its instructions in different terms.

Kelly vs. Jackson, 6 Peters, 622 (1832):

The Court was asked to make a specific charge, when the same had already been substantially given in the language of the Court itself.

STORY, J: "The instruction was certainly proper in itself to have been given, if it had not been already substantially given in the other instructions; and if the Court had given this reason for the refusal there would not have been the slightest difficulty in maintaining it, for no Court is bound, at the mere instance of the party, to repeat over to the jury the same substantial proposition of law in every variety of form which the ingenuity of counsel may suggest. It is sufficient if it be once laid down in an intelligible and unexceptionable manner."

Laber vs. Cooper, 74 U. S., 565 (7 Wall.) (1868).

A prayer for instructions was submitted by the defendant. The Court refused to give them, but charged the jury fully upon the whole case:

SWAYNE, J: "It was not error for the Court to refuse to give the instructions asked for by the defendant, even if correct in point of law, provided those given covered the entire case, and submitted it properly to the jury."

Indianapolis, &c., R. R. Co. vs. Horst, 93 U. S., 291 (1876):

SWAYNE, J.: "It is the settled law in this Court that if the charge given by the Court below covers the entire case, and submits it properly to the jury, such Court may refuse to instruct further. It may use its own language and present the case in its own way. If the results mentioned are reached, the mode and manner are immaterial. The Court has then done all it is bound to do, and may thus leave the case to the consideration of the jury. Neither party has the right to ask anything more" (Laber vs. Cooper, 7 Wall., 565).

Railway Company vs. McCarthy, 96 U. S., 258 (1877):

On the close of the testimony, the company's counsel submitted sundry instructions, and prayed that they should be given to the jury. Part were given and part refused, and proper exceptions taken to the latter. The Court then instructed the jury at large according to its own views.

SWAYNE, J.: "It has been repeatedly determined by this tribunal that no Court is bound to give instructions in the forms and language in which they are asked. If those given sufficiently cover the case and are correct, the judgment will not be disturbed, whatever those may have been which were refused."

Samuel B. Raymond vs. Henry E. Richmond, 88 N. Y., 671 (1882):

Defendant's counsel asked for additional directions, which were merely restatements in different language of the points of law already laid down, or requests to separate the propositions. Held that a refusal to do this was not an error.

Sixth.

There were other objections to the requests of the company:

1. The whole of a specific request must be accurate or it is not error to refuse it.

Hamilton vs. Eno, 81 N. Y., 116–127.
United States vs. Hough, 103 U. S., 71.

MILLER, J.: "According to the well settled rule of this Court, if either of these four propositions are erroneous, or, in other words, if all the charge thus asked was not sound law, the Court did right in refusing the prayer which presented them as a whole."

2. The requests which I have marked 1 and 2 asked the Judge to say to the jury that a person who should remain sober for a year at a time, was an habitual drunkard. If that were so, it would be difficult to say who is an occasional drunkard.

3. The request which I have marked 3 requested the Judge to instruct the jury that the policy was avoided because of the failure of the bank and of Comstock to communicate as facts matters the existence of which the plaintiff denied; and which the jury by their verdict have determined did not exist.

4. The plaintiff's requests which I have marked 4 and 5 left out the consideration of habit altogether.

Seventh.

It was not error for the Judge to exclude the testimony of the witness Torrent to the effect that Comstock's drinking had affected his health and impaired his vital powers, &c.

The witness was not an expert. He did not profess to have any professional knowledge. All that he could be asked was to state what were Comstock's habits and to testify what he observed about his health. It was not competent for him to say that the assumed condition of Comstock's health resulted from the mode of life to which he (the witness) testified.

Connecticut Mut. Life Ins. Co. vs. Lathrop, 111 U. S., 618.

HARLAN, J.: "The general rule undoubtedly is that witnesses are restricted to proof of facts within their personal knowledge, and may not express their opinion or judgment as to matters which the jury or the Court are to determine or which must constitute elements in such determination."

The witness did not claim to be competent to give the testimony which the Court excluded. He said himself that that to which he testified "was the general impression" (fol. 136). It will scarcely be contended that it was competent for him to testify to the general impression of other persons upon this or upon any subject.

Eighth.

Nor was it error for the Court to exclude the testimony of the same witness to the effect that he thought that Comstock had delirium tremens. The most that could be asked him was to state any symptoms which he observed. If those were the symptoms of delirium tremens the fact could be proved by a competent witness.

Dexter vs. Hall, 15 Wall., 9.

Ninth.

Nor was it error for the Judge to exclude the testimony of the witness Barney about conversations between himself and the doctor in reference to Comstock's condition or to reject the witness' statement of what were the fears and apprehension of the doctor about Comstock's condition.

Upon this subject the doctor was a competent witness. One of the significant features of the case is, that the doctor was not examined for the company.

Tenth.

It is apparent upon the whole case that the charge was quite as favorable as the company had the right to expect. The jury have disposed of the only question of fact, that of Comstock's habitual intemperance, in favor of the bank.

The judgment should be affirmed, with costs.

JNO. E. PARSONS,
Counsel for Defendant in Error.

F. FEHR.

Apparatus for Regulating the Pressure in Beer-Casks.

No. 215,596. Patented May 20, 1879.

Fig. 1.

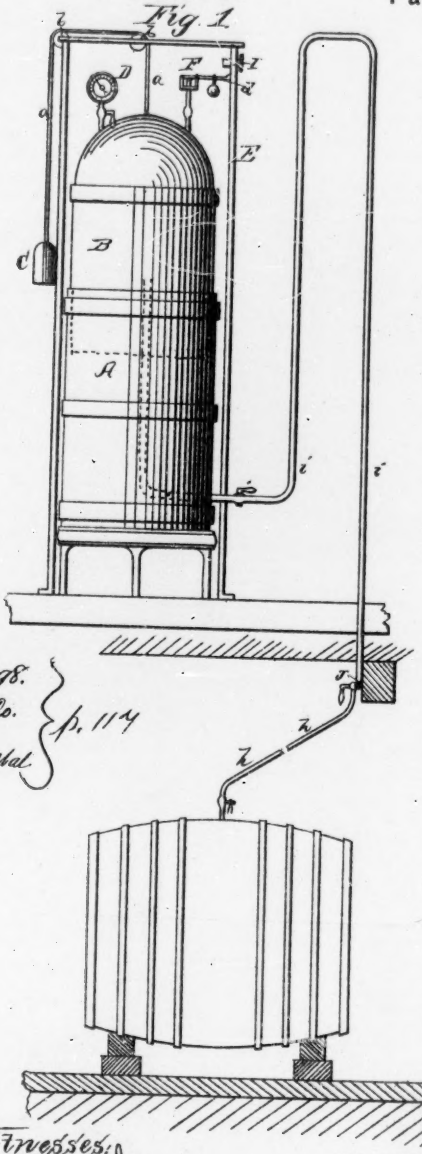


Fig. 2.

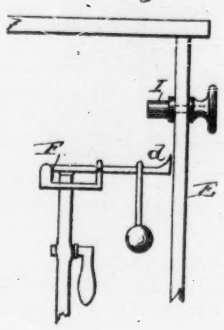
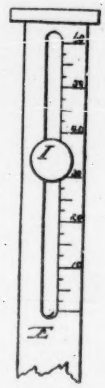


Fig. 3.



No. 298. N.P.F. Co. p. 114 A. Mausebal

Witnesses:
W. C. McArthur
John E. Ayers.

Inventor.
Frank Fehr
per
T. Alexander Gillis
Attorneys.

T. F. STRAUB.

Vent-Cock for Beer Fermenting Casks.

No. 208,771. Patented Oct. 8, 1878.

Fig. 1.

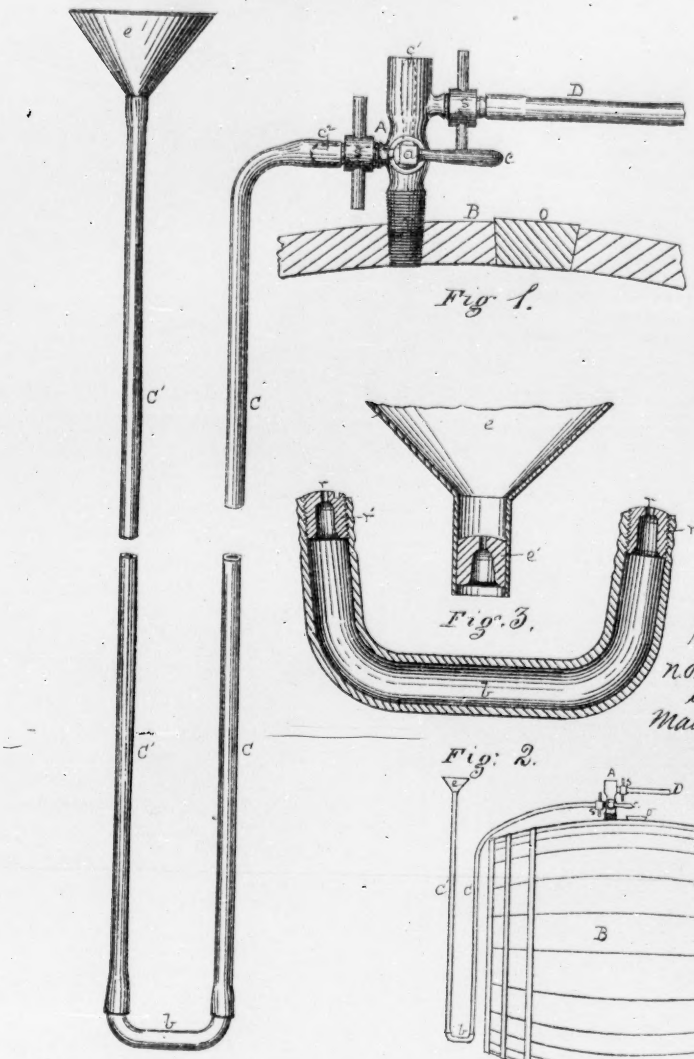


Fig. 2.

Fig. 3.

No 298. N.O.F.Co. v. Mansfield } p. 115

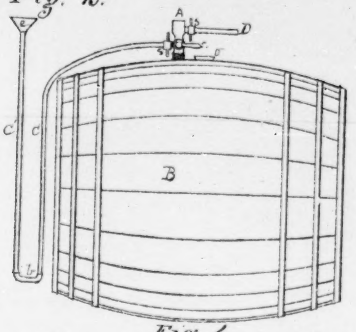


Fig. 4.

Witnesses
H. L. Glounge
H. L. Parker

Inventor Theodore F. Straub.
By Attorney George H. Christy

WILLIAM GILHAM.

Improvement in Processes and Apparatus for the Manufacture of Sparkling Wine.

No. 115,950. Patented June 13, 1871.

Fig. 1.

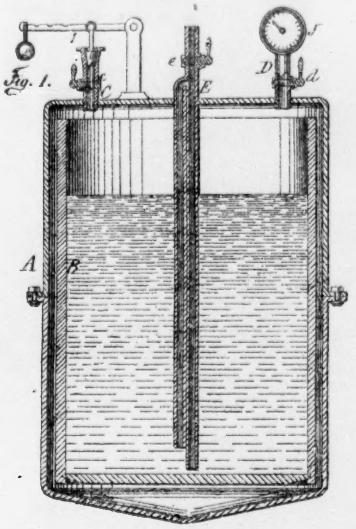


Fig. 2.

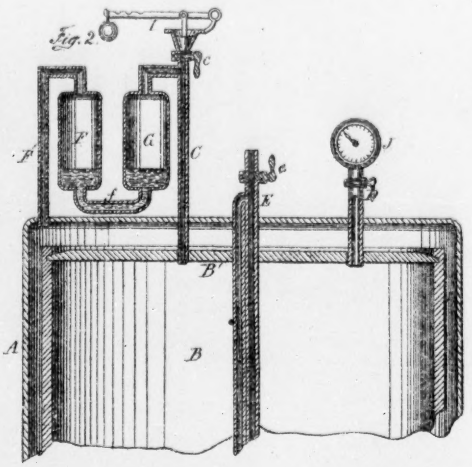


Fig. 4.

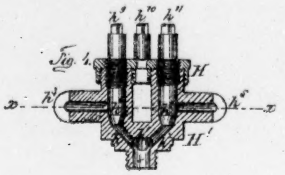


Fig. 3.

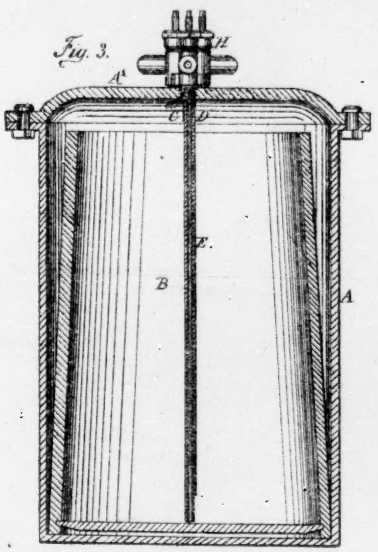
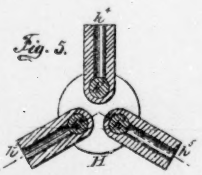


Fig. 5.



No. 298.
N.O. Fleo. } p. 97
v.
Maus et al.

Witnesses.
H. C. Elliott
W Allen

Inventor.
Wm. Gilham
By Knight Bros
Attorneys

2 Sheets—Sheet 1

J. M. PFAUDLER.

Apparatus for Regulating the Pressure in a Series of Fermenting Vessels.

No. 205,572. Patented July 2, 1878.

No. 298 N.C.Y.Co. v. Mausell. p. 108

Fig. 1

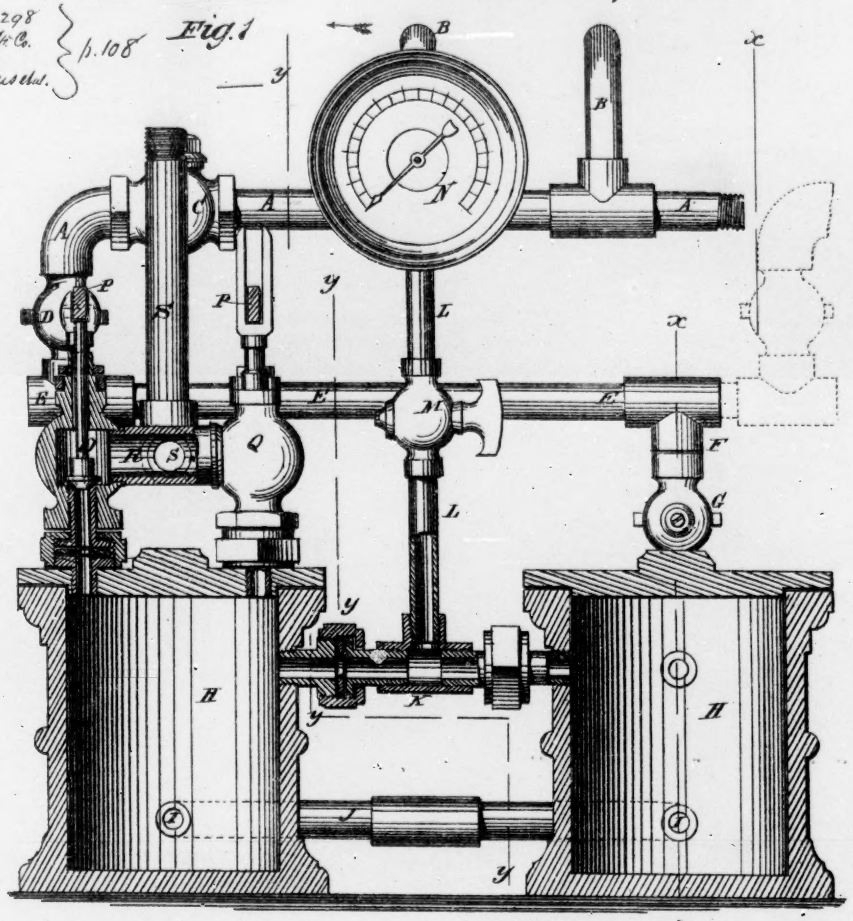


Fig. 2.

WITNESSES:

Francis. M. Andle.

C. Bedgwick

INVENTOR:

J. M. Pfaudler

BY Munn & Co

ATTORNEYS.

2 Sheets—Sheet 2

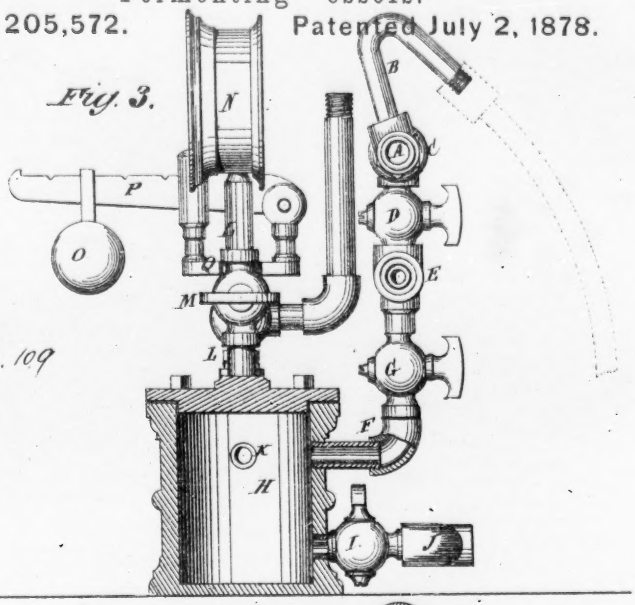
109

J. M. PFAUDLER.

Apparatus for Regulating the Pressure in a Series of Fermenting Vessels.

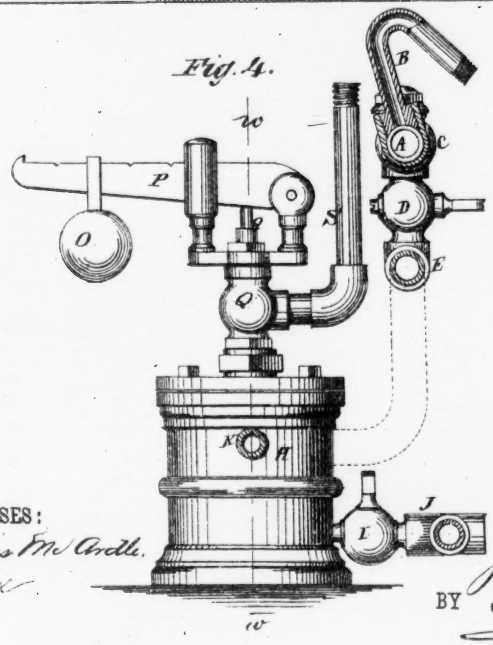
No. 205,572. Patented July 2, 1878.

Fig. 3.



No. 298.
N.P.F. Co.
v.
Maurer.
p. 109

Fig. 4.



WITNESSES:
Francis M. Ardle.
C. Sedgwick.

INVENTOR:
J. M. Pfaudler
BY Munn & Co.
ATTORNEYS.

No. 208,771, issued to Theodore F. Straub, October 8, 1878.

Marked, "Defendants' Exhibit—Straub Patent."

Survey No. 231.

Plat

of the claim of

Patrick Gallagher & Charles Gallagher

upon the

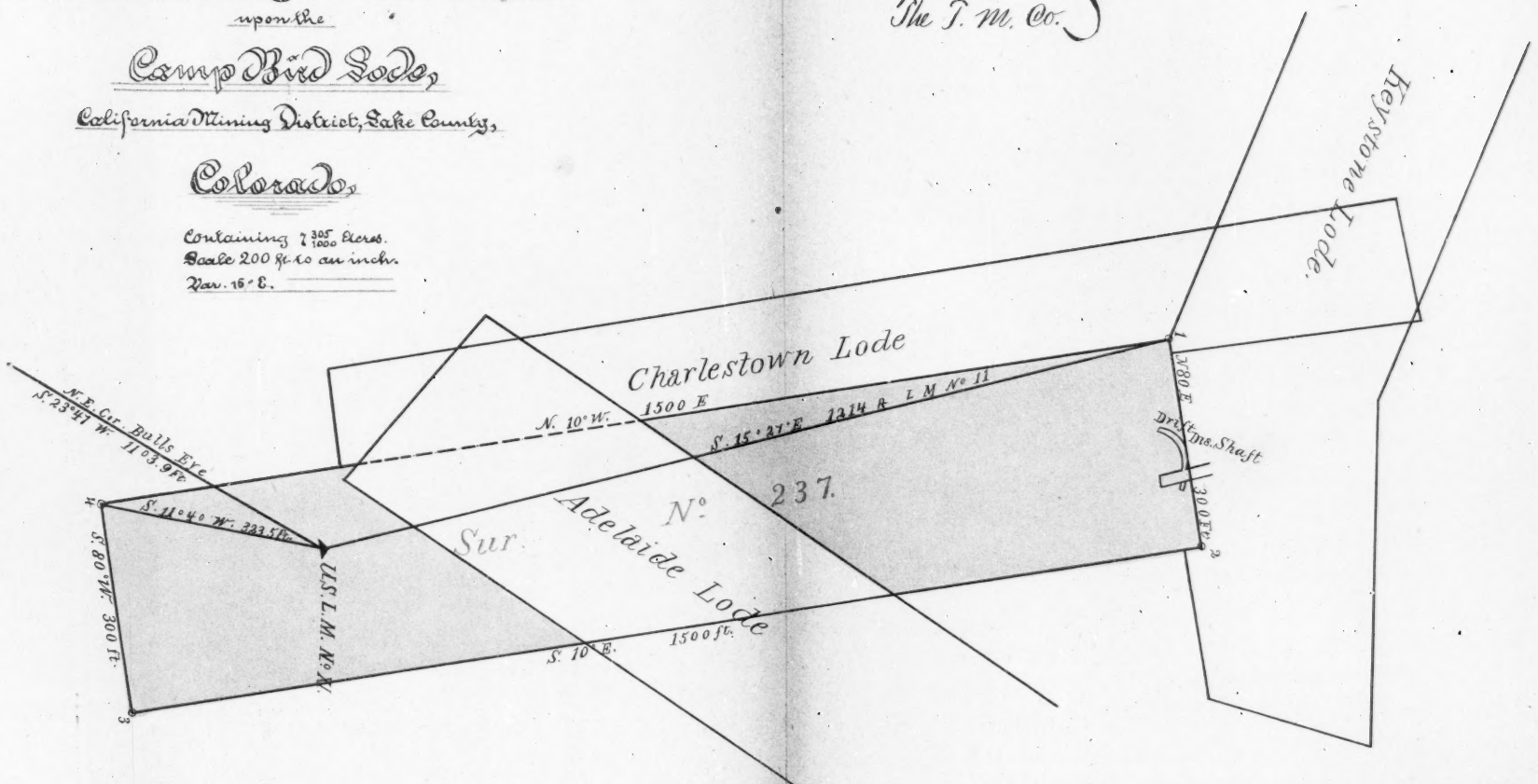
Camp Bird Lode,

California Mining District, Lake County,

Colorado,

Containing 7 305/1000 Acres.
Scale 200 ft. to an inch.
Var. 16° E.

No. 250.
The A. M. Co.
v.
The T. M. Co.
} p. 73.



Survey No. 287.

Plat of the Claim of

The Argentine Mining Company,

upon the

Pine Lode.

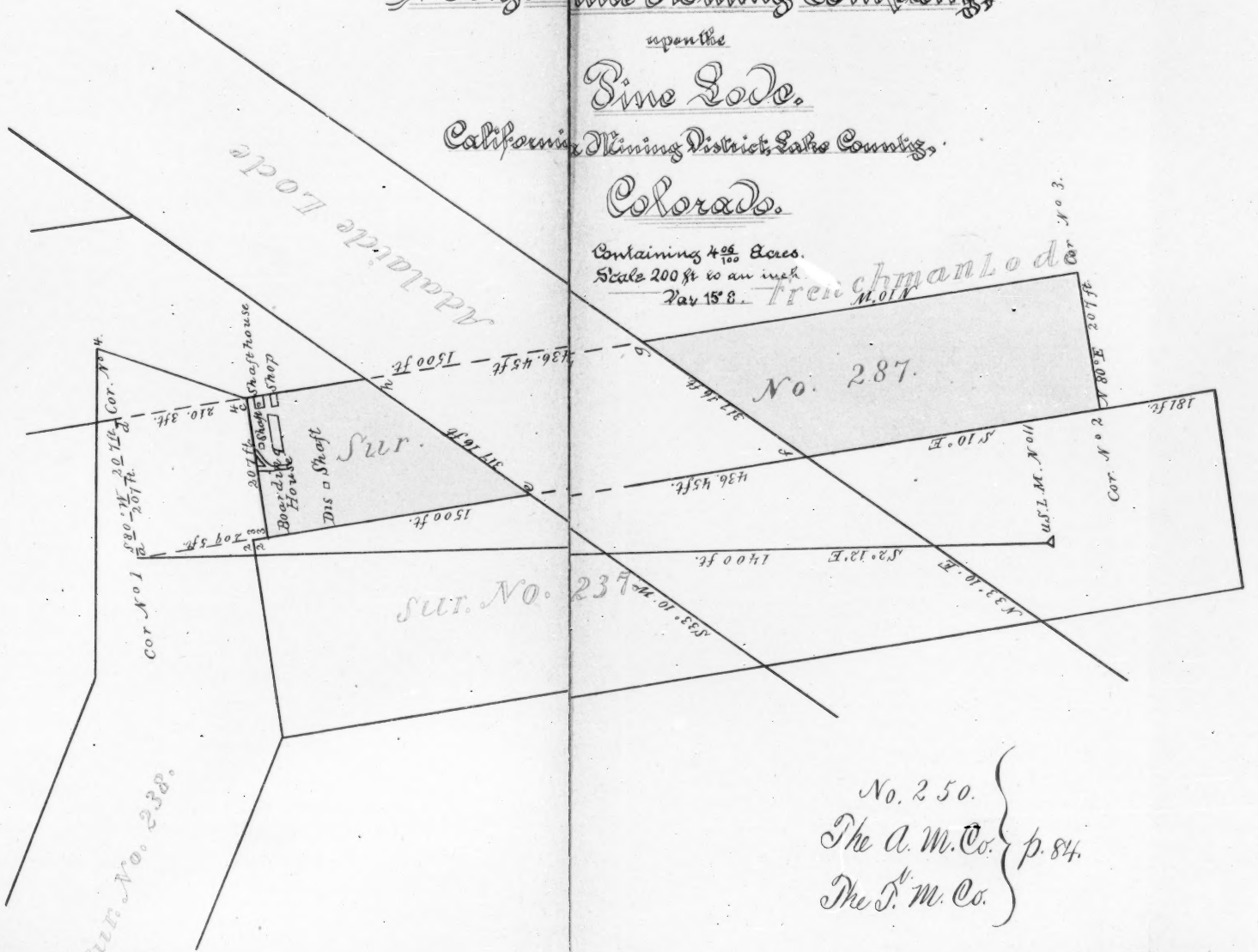
California Mining District, Lake County,

Colorado.

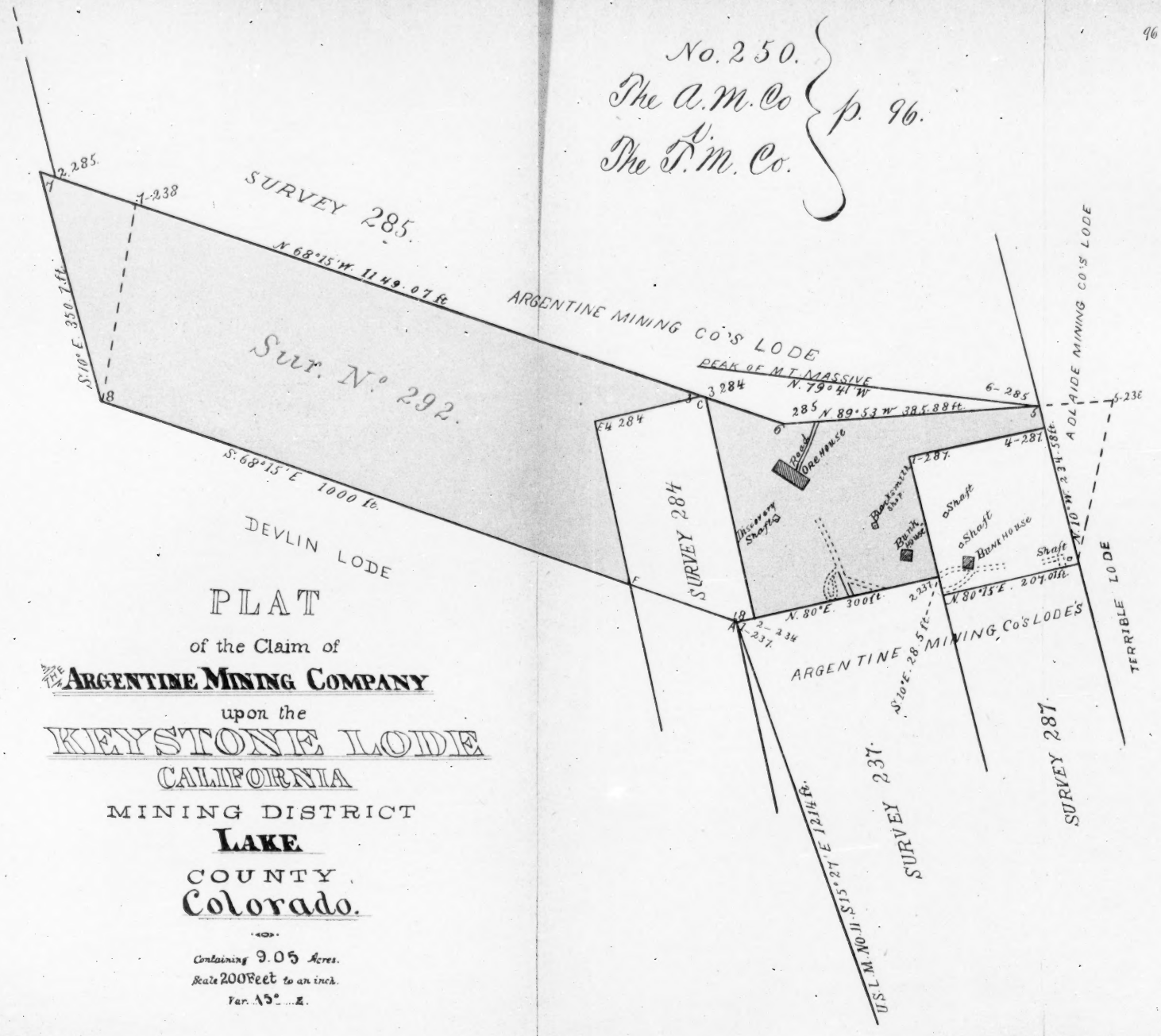
Containing 4 06/100 Acres.

Scale 200 ft to an inch.

Var 15° E.


Adalaide Lode
Frenchman Lode
No. 287.
Sur.
Sur. No. 237
Sur. No. 238.
Cor. No. 4.
Cor. No. 1
Cor. No. 2
Cor. No. 3.
Chas. House
Shop
Boarding House
Dis. Shaft
N. 01° W.
N. 80° E. 207 ft.
S. 10° E.
S. 11° W.
S. 2° 12' E.
S. 33° 10' W.
N. 33° 10' E.
1500 ft.
436. 45 ft.
317. 10 ft.
181 ft.
210. 3 ft.
207 ft.
207 ft.
207

No. 250.
The A.M.Co } p. 96.
The T.M.Co.



PLAT

of the Claim of

The ARGENTINE MINING COMPANY

upon the

KEYSTONE LODE

CALIFORNIA

MINING DISTRICT

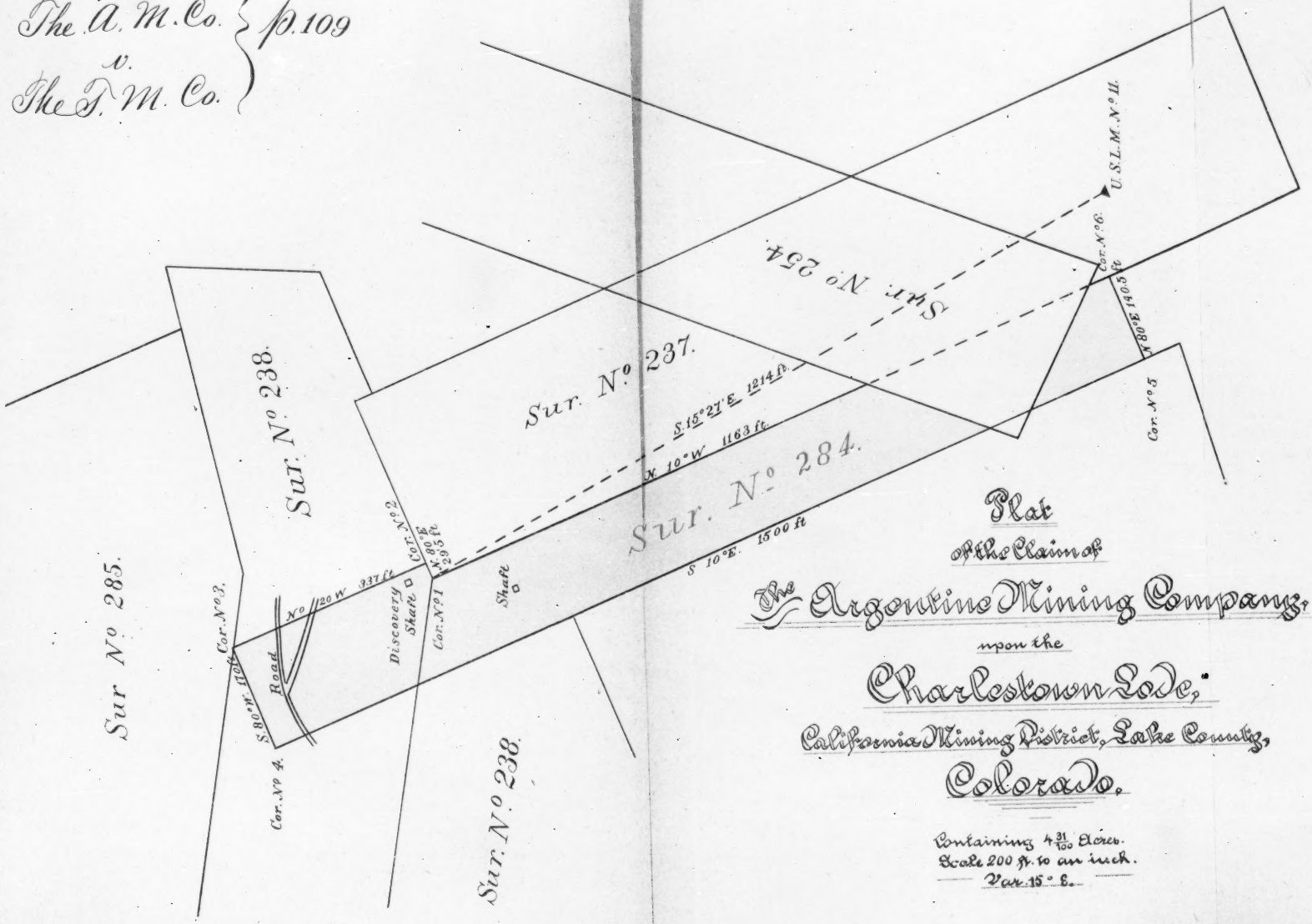
LAKE

COUNTY

Colorado.

Containing 9.05 Acres.
Scale 200 Feet to an inch.
Var. 15° ... E.

No. 250.
The A. M. Co.
v.
The T. M. Co.
} p. 109



Plat

of the Claim of

The Argentine Mining Company,

upon the

Charlestown Lode,

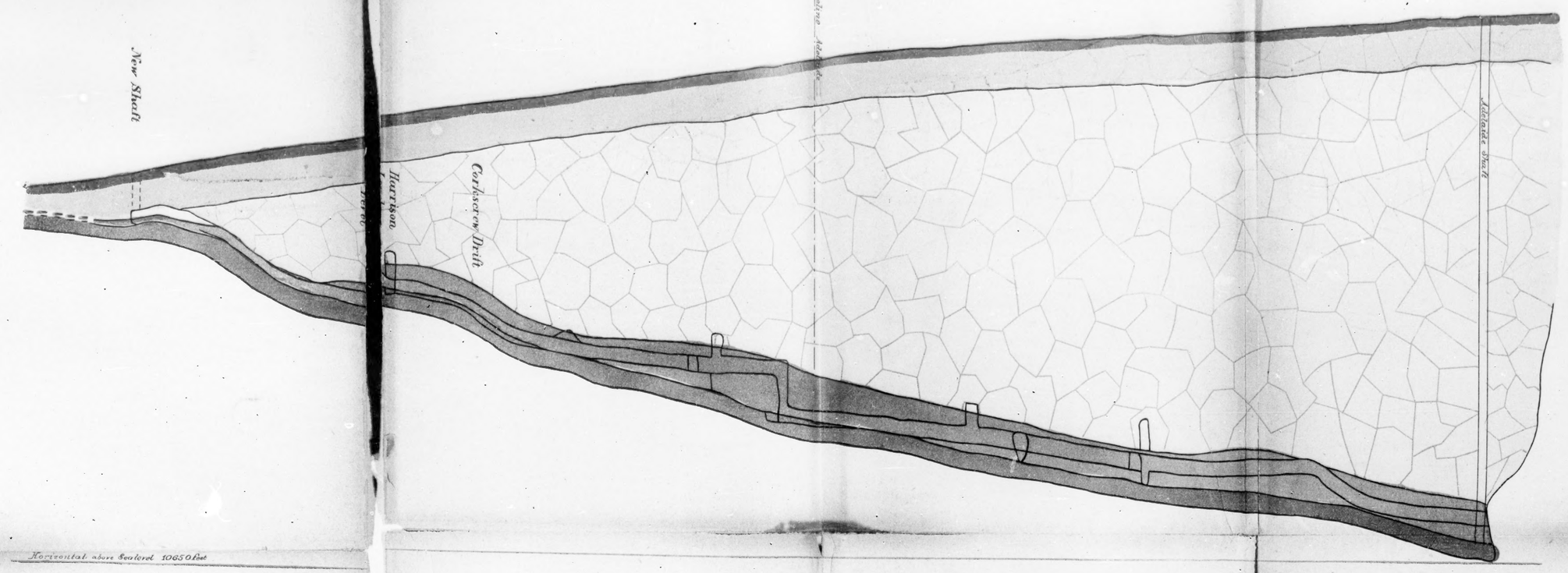
California Mining District, Lake County,

Colorado.

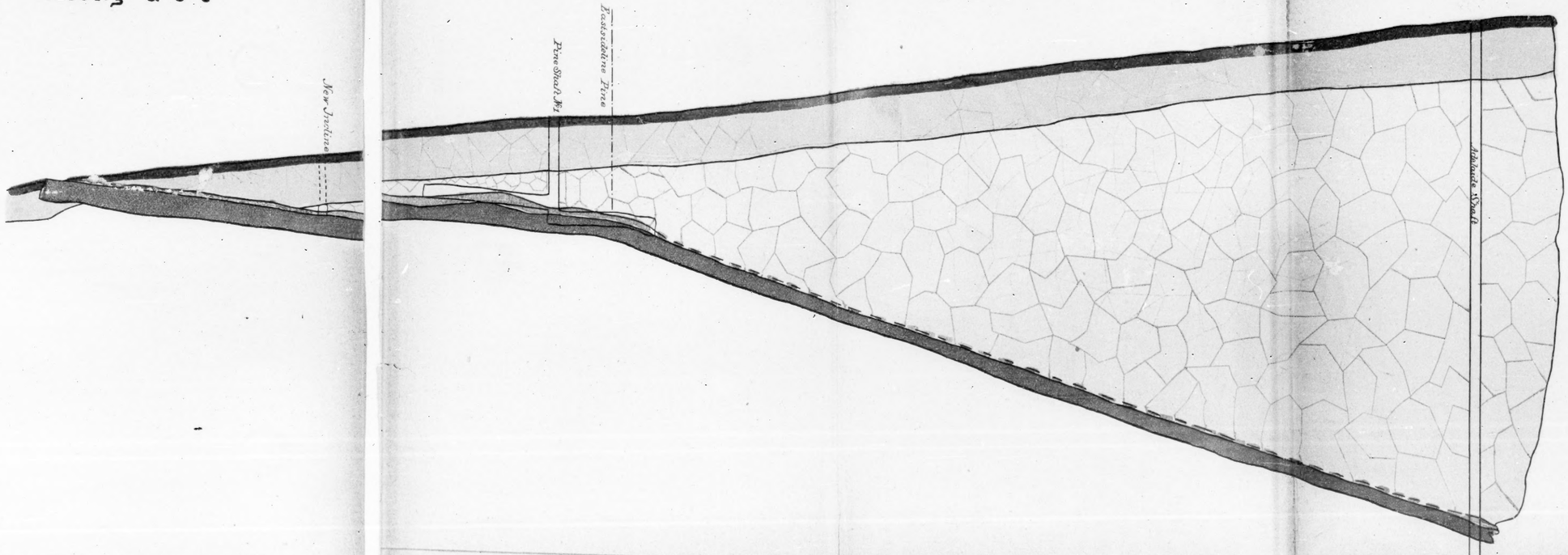
Containing 4 31/100 Acres.
Scale 200 ft. to an inch.
Var 15° E.

VERTICAL SECTIONS

Along a-e-f-c

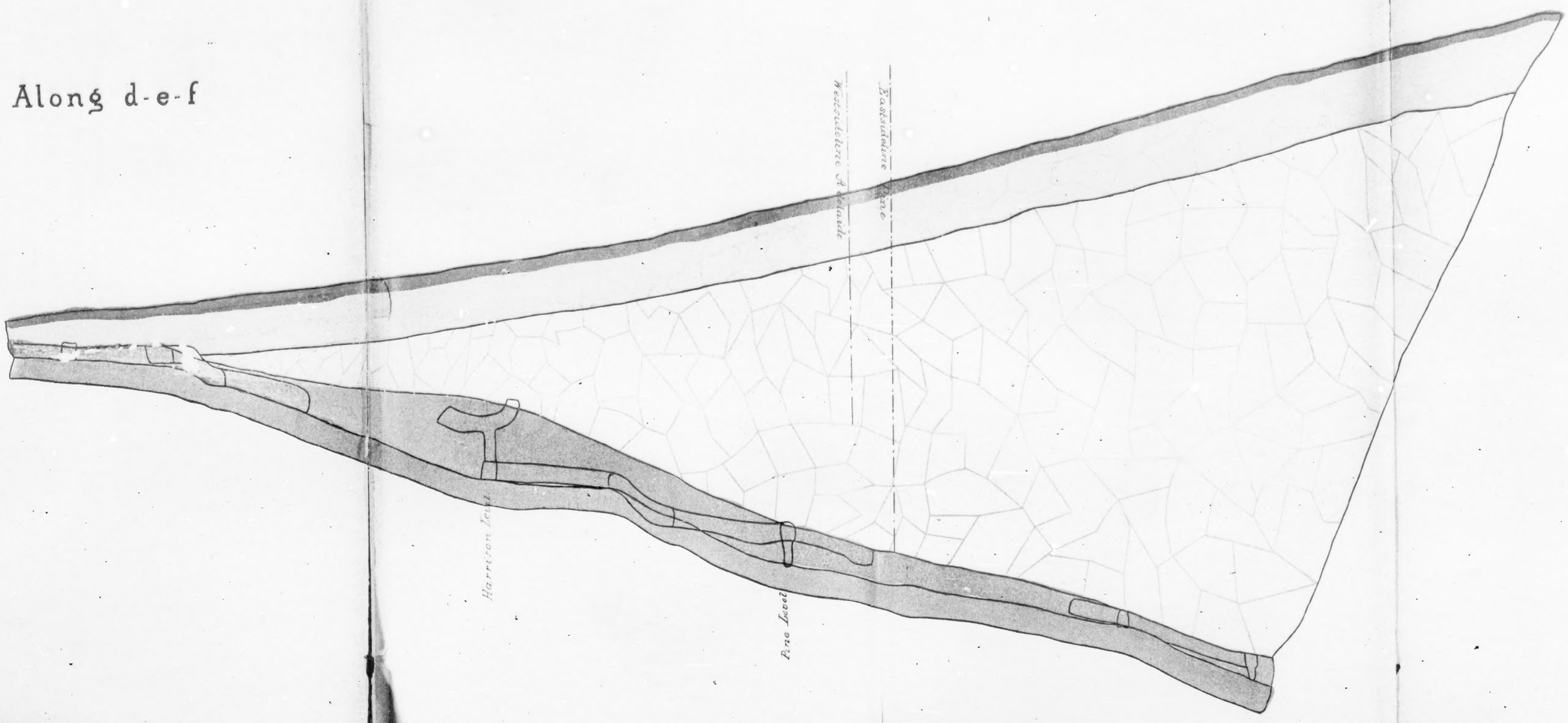


Along a-b-c



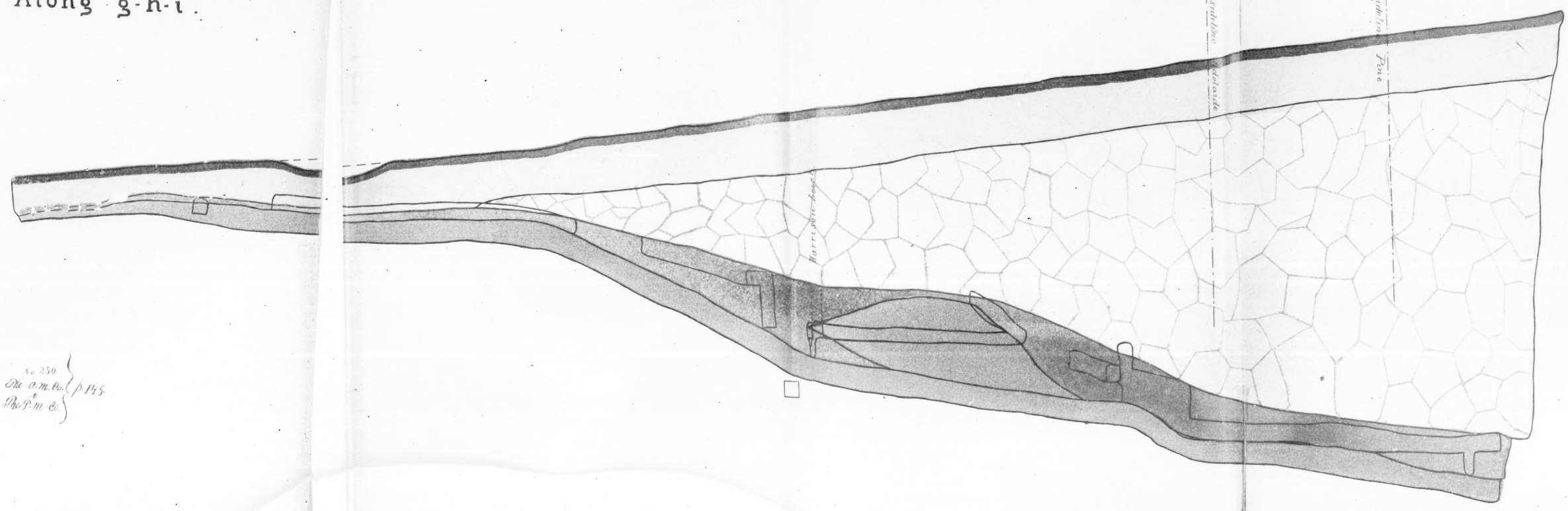
Along d-e-f

Along d-e-f



Horizontal 1 Inch = 1 Statute Mile = 10650 ft

Along g-h-i.



No. 250
Rio A.M.Co.
&
Rio P.M.Co.
} p. 145

Scale 1" = 1 Inch

SHAFT A

SHAFT B

SHAFT C

SHAFT D

Terrible Tunnel

Tunnel to Shaft B

Tunnel to Shaft C

Tunnel to Shaft D

DISC. OF SHAFT OF ADELAIDE

SHAFT

ADELAIDE SHAFT No. 2

ADELAIDE SHAFT No. 1

INCLINE

TUNNEL

"Applebee" Dr...

PINE SHAFT No. 2

PINE SHAFT No. 1

NEW SHAFT

INCLINE

TUNNEL

ARGENTINE

CAMP BIRD SHAFT No. 2

Camp Bird Shaft

Engine Shaft

BIRD SHAFT

Shaft

Keystone Discovery Shaft

Shaft

Shaft

Shaft

Merlin Shaft

TERRIBLE

PINE

ADELAIDE

CAMP BIRD

CHARLESTOWN

KEYSTONE

YOUNG AMERICA

SOUTH

WEST

11

SCALE
20 Feet To 1-Inch